



THE MACMILLAN COMPANY  
NEW YORK • BOSTON • CHICAGO • DALLAS  
ATLANTA • SAN FRANCISCO

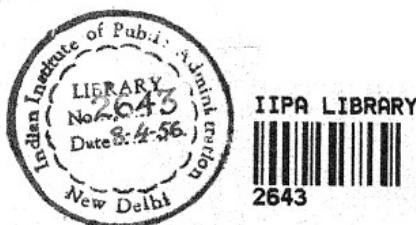
MACMILLAN AND CO., LIMITED  
LONDON • BOMBAY • CALCUTTA • MADRAS  
MELBOURNE

THE MACMILLAN COMPANY  
OF CANADA, LIMITED  
TORONTO

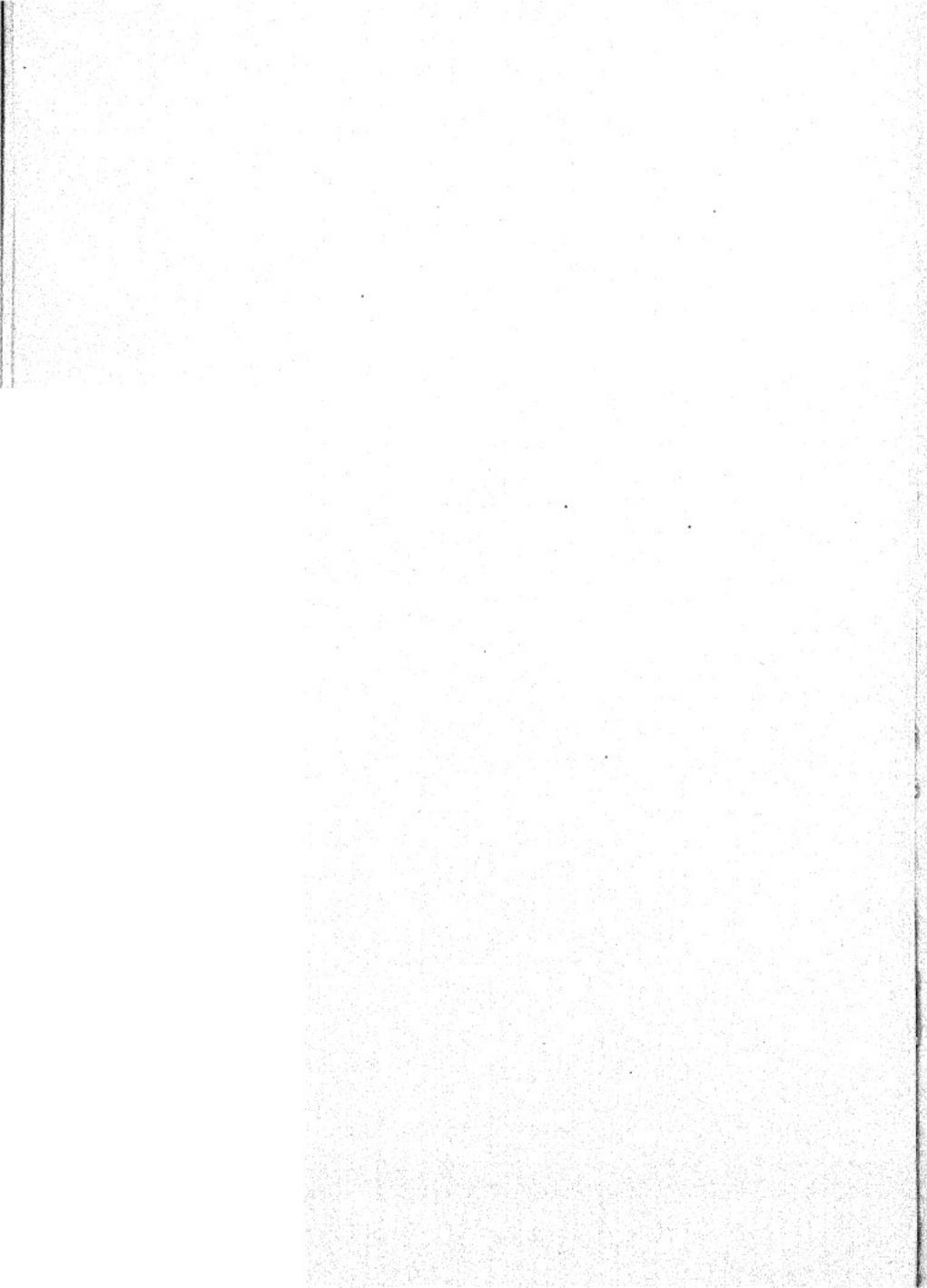
# *Public Control of Labor Relations*

A STUDY OF THE NATIONAL  
LABOR RELATIONS BOARD

BY D. O. Bowman UNIVERSITY OF MICHIGAN



THE MACMILLAN COMPANY · NEW YORK



## PREFACE

The administrative method of public control is not new nor may it be said to be old. It may perhaps best be regarded as in process of formation, and this study was made because we have not yet crystallized the relationship of law and economics.

The plan of study was formulated with the purpose of making a close and detailed observation of the National Labor Relations Board and its functions, not only for purposes of appraisal, but also to relate the experience of this agency to the basic problems that are attached to the use of a public administrative agency to control relationships in various segments of the economy. The study is divided into six parts. Part I describes the legislative background of the National Labor Relations Act. Part II deals with unfair labor practices proscribed by the Act. Part III analyzes the problems confronting the Board in the certification of collective bargaining representatives. Part IV considers in detail the procedures of the Board. Part V is concerned with organization and personnel. Part VI portrays the Board's record, considers public policy, and appraises the Board and the administrative process. Appraisal of the Act, the Board, and the administrative method, however, is interwoven throughout the entire study.

It is impossible to rank source material in terms of importance. Much reliance was of course placed upon Board reports, Board cases and decisions, and Board press releases. Numerous congressional hearings and reports were a fruitful source of information. Court decisions were of necessity much used. In the instances where particular information was sought from the Board, cooperation was forthcoming. Some books and monographs in the field of labor relations and administrative law were drawn upon.

Proper acknowledgments are difficult. The intellectual stimulation was provided by Prof. I. L. Sharfman's exhaustive study of the Interstate Commerce Commission, as well as by Professor Sharfman himself. I am indebted to other members of the Economics Department of the University of Michigan for their suggestions, criticisms, and reading of the manuscript. Fortunately, for a number of months the advice of Mr. F. F. Blachly was available. Space permits only inadequate recognition of the gratitude due various members, officials, and personnel of the National Labor Relations Board, and such gratitude is also due certain union officials for their cooperation. Especially helpful were the interviews granted by members of the Congress and by persons who have been close to the problems of management-labor-government relations since at least N.R.A. days. Such conversations served to verify with realism separately reached conclusions, or in some instances provided additional clews and insight. Finally, the financial assistance and the cooperation provided jointly by the University of Michigan and the Brookings Institution made the study possible.

It is hoped that this study will add to the growing volume of information on our problems and methods of public control. Only by such detailed studies is it possible to ascertain weaknesses of present arrangements so that future processes can better serve the community.

D. O. BOWMAN

ANN ARBOR, MICHIGAN

June, 1942

## TABLE OF CONTENTS

### PREFACE

vii

### *Part I. THE LEGISLATIVE POLICY*

#### *Chapter I. THE DEVELOPMENT OF LEGISLATIVE POLICY*

3

The Common Law—Commission Findings—The War Labor Board—  
Railway Labor Legislation and the Norris-La Guardia Act—The National  
Industrial Recovery Act—Further Attempts to Legislate—Joint  
Resolution No. 44—The Accomplishments of the Labor Boards—Re-  
capitulation of Legislative Background—The Wagner Bill.

#### *Chapter II. THE LEGISLATIVE POLICY* 58

#### *Chapter III. CONSTITUTIONAL ISSUES* 61

May the Congress Regulate?—Is Substantive Due Process Violated?—  
Is Procedural Due Process Violated?

### *Part II. UNFAIR LABOR PRACTICES*

#### *Chapter IV. UNFAIR LABOR PRACTICES* 69

Employer Activity Regarded as Interference, Restraint, and Coercion—  
Company Domination of Employee Organizations—Discrimination  
With Regard to Labor Organizations—Retaliatory Discrimination—Re-  
fusal to Bargain Collectively.

#### *Chapter V. REMEDIES FOR UNFAIR LABOR PRACTICES* 83

General—The Negative Portion of an Order—The Affirmative Portion  
of an Order—Court Control of Board Orders.

#### *Chapter VI. PROSCRIPTIONS AND PROBLEMS* 101

Coercion and “One-sidedness”—Interference—Free Speech and Free  
Press—The Closed-shop Issue—Discrimination Against a Potential  
Employee—What Is Collective Bargaining?

<i>Part III. CERTIFICATION OF REPRESENTATIVES</i>	
<i>Chapter VII. REPRESENTATION CASES</i>	133
General—Typical Cases—The Existence of Contracts and the Time Element—“Proof” of a Majority.	
<i>Chapter VIII. THE MAJORITY-RULE REQUIREMENT</i>	141
Interpretations of “Majority”—Majority Rule v. Proportional Representation.	
<i>Chapter IX. THE APPROPRIATE UNIT</i>	160
General—The Factors Determining the Unit—The Appropriate Unit and Organized Labor—Congressional Intent and the Appropriate Unit—Unit Determination under Other Legislation.	
<i>Chapter X. BOARD MEMBERS' VIEWS ON THE UNIT</i>	187
Mr. Donald Wakefield Smith—Mr. Edwin S. Smith—Mr. Warren Madden—Mr. William Leiserson.	
<i>Chapter XI. THE LABOR MOVEMENT AND THE UNIT</i>	202
The AF of L—The CIO—The Garrison Proposal.	
<i>Chapter XII. COURT REVIEW OF BOARD CERTIFICATIONS</i>	215
The Longshoremen's Case—The <i>Consumers Power</i> Case—The <i>Falk</i> Case—Should There Be Review?	
<i>Part IV. THE PROCEDURE OF THE BOARD</i>	
<i>Chapter XIII. COMPLAINT CASES</i>	225
The Charge—The Complaint.	
<i>Chapter XIV. COMPLAINT CASES (Continued)</i>	253
The Hearing—The Intermediate Report—The Board's Decision—Procedural Strengths and Weaknesses.	
<i>Chapter XV. PROCEDURE IN REPRESENTATION CASES</i>	297
The Petition—Informal Disposition of Petitions—Investigation and Hearing—The Certification.	
<i>Chapter XVI. THE DISPOSITION OF CASES</i>	315
Disposition Before Formal Action—Disposition After Formal Action—Disposition After Transfer to the Board—Settlements—Specialization in Settlements—The Compliance Unit—Pressure to Compel Compliance.	

## TABLE OF CONTENTS

xi

### *Part V. ORGANIZATION AND PERSONNEL*

<i>Chapter XVII. THE BOARD'S WASHINGTON OFFICE</i>	339
--	-----

The Board—The Executive Office—The Economics Division—The Publications Division—The Personnel Division—The Legal Division—The Trial Examiners Division.

<i>Chapter XVIII. THE REGIONAL OFFICES</i>	369
--	-----

General—The Regional Directors—The Regional Attorneys—The Field Examiners.

<i>Chapter XIX. PERSONNEL CONSIDERATIONS</i>	375
--	-----

General—Personnel and Politics—The Personnel and Legislative Pressure—Centralization of Procedure.

### *Part VI. RECORD AND RECAPITULATION*

<i>Chapter XX. CASE STATISTICS</i>	399
------------------------------------	-----

The Flow of Cases—The Disposition of Cases.

<i>Chapter XXI. EFFECTS OF THE ACT AND THE BOARD</i>	412
--	-----

The Stages of Opposition—The Strikes Record—Strikes Handled and Averted—Union Organization—Trade Agreements—Employer and Union Attitudes—Other Effects.

<i>Chapter XXII. THE COURT RECORD OF THE BOARD</i>	447
--	-----

The Amount of Litigation and the Board's Record—Board Comparisons with Other Agencies' Records—Factors Relating to the Court Record.

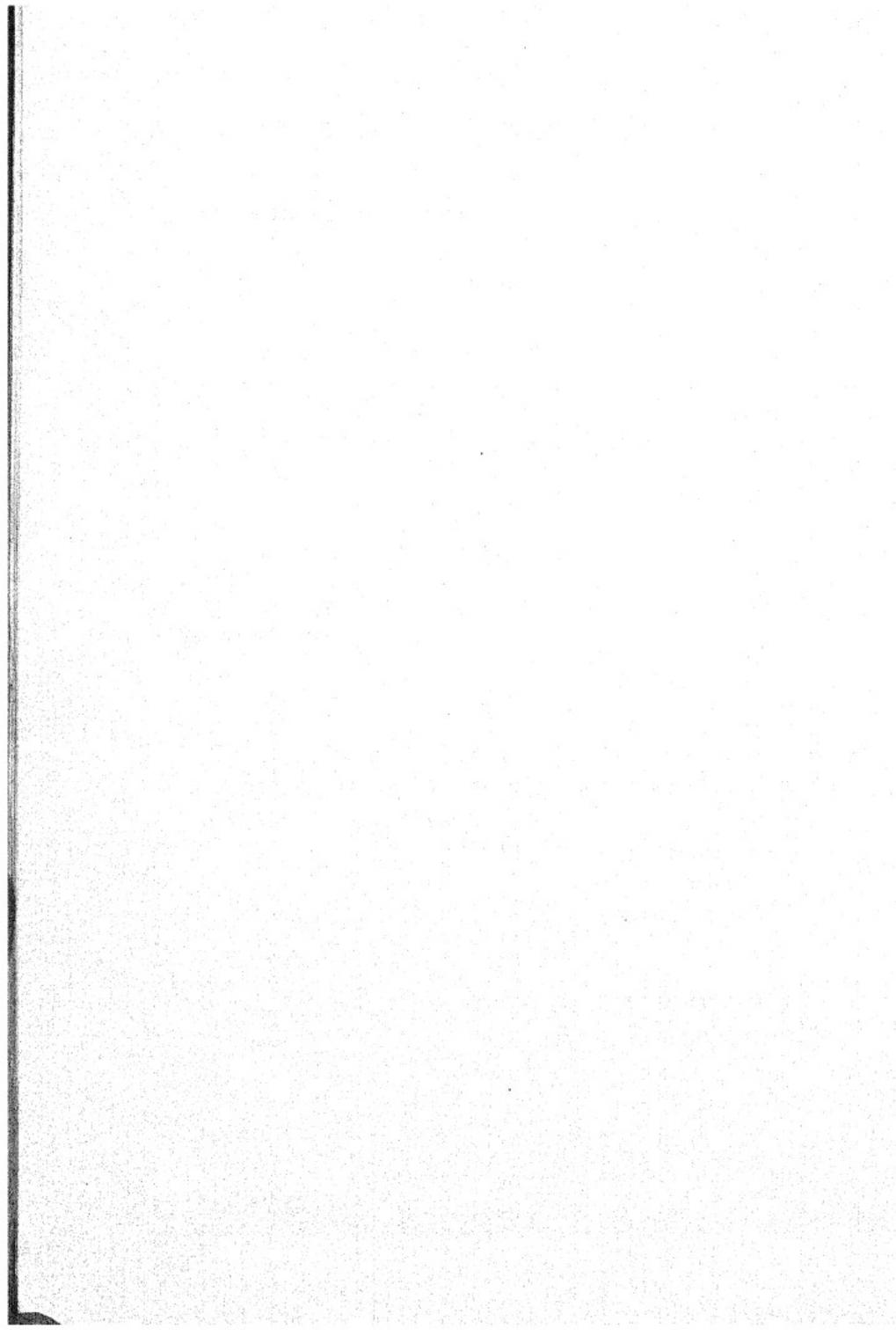
<i>Chapter XXIII. LABOR RELATIONS AND PUBLIC POLICY</i>	457
---	-----

State Labor Relations Laws—The National Labor Relations Act and Public Policy.

<i>Chapter XXIV. THE BOARD AND THE ADMINISTRATIVE PROCESS</i>	472
---	-----

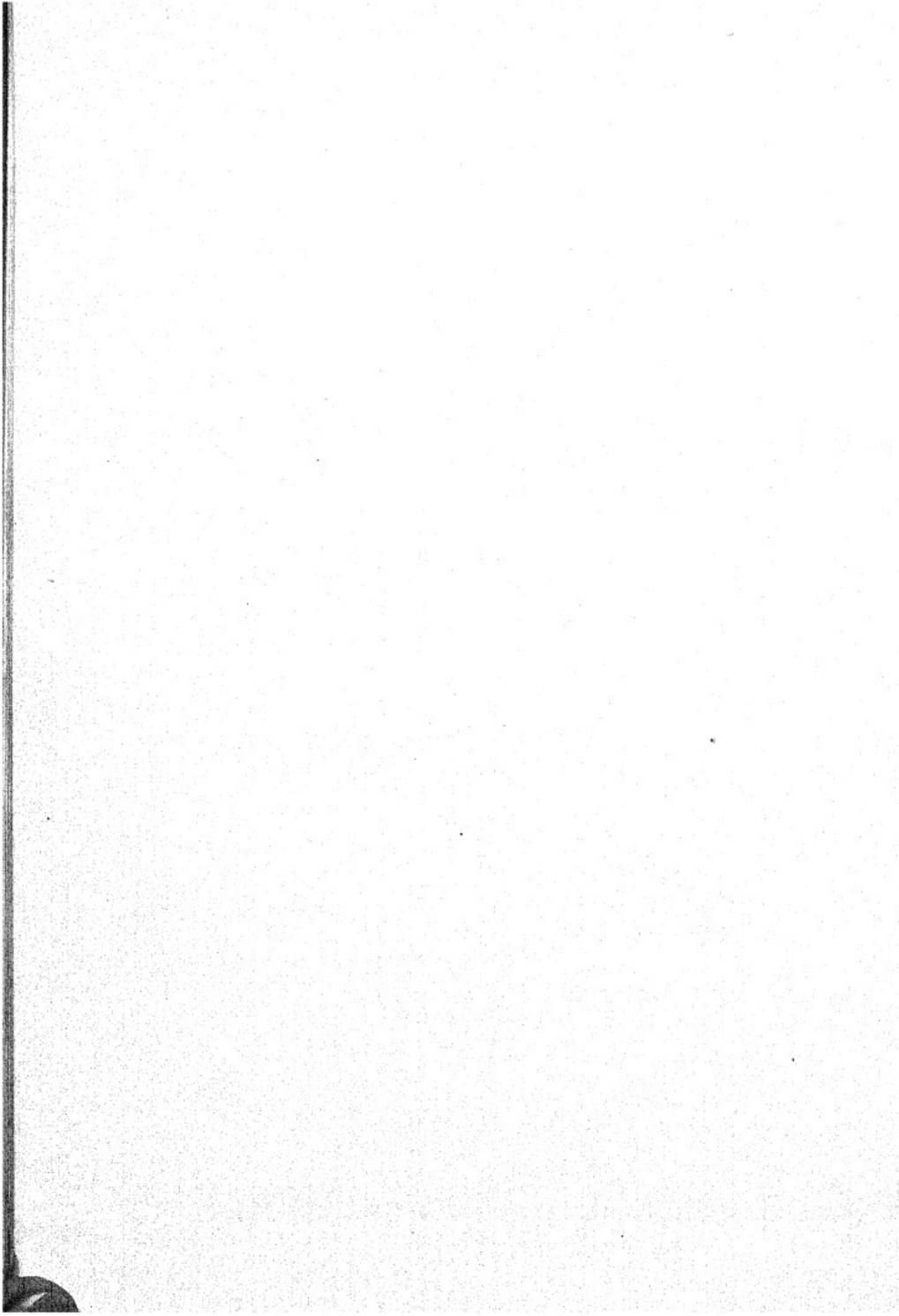
<b>APPENDIX</b>	487
-----------------	-----

<b>INDEX</b>	501
--------------	-----



*Part One*

The Legislative Policy



## Chapter I. THE DEVELOPMENT OF LEGISLATIVE POLICY

### A. The Common Law

In the case of *Commonwealth v. Hunt*<sup>1</sup> of 1842, Chief Justice Shaw decided that working people were doing nothing wrong when they organized in unions for common benefit, "benefit" meaning a rise in their social condition or an improvement in their trade. The organization of such people was to be condemned only when an injustice was done or oppression was caused by the power of combination. By this decision the conspiracy doctrine as applied to labor unions was weakened, and the abstract legality of labor organizations was established in the sense that laborers could associate themselves in labor organizations and not thereby be guilty of committing a wrong or acting criminally. But unionism and collective bargaining were not elevated to a status with legal protection. *Commonwealth v. Hunt* did not create any rights which employers had to respect; for a legal right in one person must mean an obligation or duty on the part of other persons not to trespass on the right, with agencies of law ever ready to protect and enforce.<sup>2</sup>

Through many decades following 1842, laborers obtained no tangible benefits related to the abstract right to organize and to bargain collectively. Against the abstract right the employers brought the preponderant weight of their economic strength, which the unions fought with the strength of their organization, the boycott, the picket, and the strike. Legal battles were fought where judges decided whether the intent, means, or ends of a union rendered it unlawful. Common and state law as inter-

<sup>1</sup> *Commonwealth v. Hunt*, Mass. (1842), 4 Metcalf, 111.

<sup>2</sup> W. M. Leiserson, *Right and Wrong in Labor Relations*, Univ. of California Press, pp. 25-27.

preted by the courts operated to hinder the workers' attempts at effective organization. The interpretation of Federal statutes also reacted against the workers. The Sherman Act, passed to curb business combinations, first gained prominence in 1895 as an anti-labor weapon<sup>3</sup> and in 1908 was used to break a union boycott.<sup>4</sup> Other cases with similar decisions led to an attempt by organized labor to improve its position by including in the Clayton Act<sup>5</sup> of 1914 sections designed to limit the use of the injurious injunction and classify its right as to existence and activities. Again adverse court decisions rendered Federal legislation a weapon for anti-union forces.<sup>6</sup> With the employer free to bring his full and powerful economic strength to bear against unions, industrial warfare often resulted over the plain issue of whether unions should exist. Such warfare, with the issue of collective bargaining paramount, was especially prevalent in the so-called "strike periods" of 1886-1887, 1901-1905, 1916-1922, and 1933-1935.<sup>7</sup>

### B. Commission Findings

But there were also tendencies working toward the solution of industrial disputes, tendencies which included the Federal Government as an agency to do more than send troops to quell strikers. The Federal Government's Bureau of Labor was formed in 1884; and by 1885 the Senate Committee on Labor and Education had rendered a "notable report," the basis of which was a long investigation into the activities and welfare of labor and labor conditions in general.<sup>8</sup> In 1898 the Congress appointed the Industrial Commission. In a final report in 1902, after taking testimony and completing sufficient investigation to fill nineteen volumes, the Commission recommended that collective bargaining be adopted. The Commission, however, refused to recommend legislation to make collective bargaining a matter of national policy:

<sup>3</sup> *In Re Debs*, 158 U. S. 564 (1895) and connected cases.

<sup>4</sup> *Loewe v. Lawlor*, 208 U. S. 274 (1908).      <sup>5</sup> 38 Stat. L. 730, 738.

<sup>6</sup> Notably *Duplex Printing Co. v. Deering*, 254 U. S. 349 (1921); *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921); *United Mine Workers v. Coronado Coal and Coke Co.*, 259 U. S. 344 (1922), 268 U. S. 295 (1925); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Association*, 274 U. S. 37 (1927).

<sup>7</sup> N.L.R.B., *Governmental Protection of Labor's Right to Organize*, Div. of Econ. Research, Bulletin No. 1, pp. 3-8.

<sup>8</sup> Twentieth Century Fund, Inc., *Labor and the Government*, p. 145.

"The Commission has had to consider the question whether anything can be done by legislation to promote the adoption of these methods [*i.e.*, voluntary collective bargaining, arbitration, and conciliation]. It is obvious that a mere legal authorization of such methods has no significance."<sup>9</sup>

The Anthracite Coal Strike Commission in its report in 1902 to the Congress, while refusing jurisdiction of the question of recognition of the United Mine Workers of America, officially suggested that modern industrial conditions demanded collective bargaining. In addition, the ninth award of the Commission held ". . . that no person shall be refused employment or in any way discriminated against, on account of membership or non-membership in any labor organization; and that there shall be no discrimination against, or interference with, any employee who is not a member of any labor organization by members of such organization."<sup>10</sup> This was a clear and unequivocal statement that unions and collective bargaining were desirable to lessen industrial conflict.

In 1912 there was appointed by Congress the United States Commission on Industrial Relations. In a minority report made in 1916, the Commission stated:

"As a result, therefore, not only of fundamental considerations but of practical investigations the results of which are described in detail

<sup>9</sup> Final Report of the Industrial Commission (1902), Vol. XIX, pp. 855-856. Regarding collective bargaining, the Commission said in part (pp. 844-845):

"Whatever may be thought of the desirability of legislation regarding the settlement of labor disputes, there is a general consensus of opinion that . . . systems of collective bargaining . . . within the various trades themselves would prove highly advantageous, both to employers and working men, and to the general public . . . Experience both in England and our own country shows that where these practices have become fairly well established they greatly reduce the number of strikes and lockouts, and in many trades do away with them altogether for long periods of time."

<sup>10</sup> The Committee wrote with regard to collective bargaining:

"Whatever the jurisdiction of this Commission under the submission may be, the suggestion of a working agreement between employer and employees embodying the doctrine of collective bargaining is one which the Commission believes contains many hopeful elements for the adjustment of relations in mining regions . . ."

*Report to the President on the Anthracite Coal Strike of May-October, 1902*, by the Anthracite Coal Strike Commission, pp. 62-63, 83. President Theodore Roosevelt appointed the Commission at the request of operators and miners. The Commission's report favored trade unionism but deplored the irresponsibility of the United Mine Workers.

hereinafter, it would appear that every means should be used to extend and strengthen the organizations throughout the entire industrial field. . . . It is suggested that the Commission recommend the following action:

"1. Incorporation among the rights guaranteed by the constitution of the unlimited right of individuals to form associations, not for the sake of profit, but for the advancement of their individual and collective interests.

"2. Enactment of statutes specifically protecting this right and prohibiting the discharge of any person because of his membership in a labor organization.

"4. That the Federal Trade Commission be specifically empowered and directed by Congress, in determining unfair methods of competition to take into account and specially investigate the unfair treatment of labor in all respects, with particular reference to the following points:

(a) Refusal to permit employees to become members of labor organizations.

(b) Refusal to meet or confer with the authorized representatives of employees."<sup>11</sup>

Here was an "official" demand that collective bargaining be promulgated as a matter of national policy. The real importance attaches, however, to the contemplated implementation of the policy—the use of the quasi-judicial agency to enforce statutes designed to permit employees to join unions and to bargain collectively. The recommendations described in this minority report were to be largely embodied in the Wagner Act of 1935, although a quasi-judicial agency was to be created especially to carry out the policy.

The advent of war brought a demand that commerce not be hindered by industrial disputes. The President's Mediation Commission, set up in 1917 to effect a settlement of labor difficulties in four industries, reported in favor of collective bargaining to meet modern conditions, implemented by appropriate administrative machinery.<sup>12</sup>

<sup>11</sup> See U. S. Commission on Industrial Relations, *Industrial Relations*, Vol. I, pp. 17-152, for material on employer-employee relationships.

<sup>12</sup> "The causes of unrest suggest their own means of correction:

"2. Modern large-scale industry has effectually destroyed the personal relation

### C. The War Labor Board

In 1917 the National Industrial Conference Board also had recommended to the Council of National Defense that a Federal board to adjust labor disputes be set up. In the recommendation it was stated as a "fundamental American doctrine . . . that no person shall be refused employment or in any way discriminated against on account of membership or non-membership in any labor organization . . ."<sup>13</sup> The Council of National Defense in turn formed the War Labor Conference Committee, which developed into the War Labor Conference Board. This Board, representing labor and management, unanimously recommended the formation of the War Labor Board and the adoption of a set of principles which included recognition of the right to organize and bargain collectively and to engage in legitimate trade-union activity.<sup>14</sup> The Board was created April 8, 1918.<sup>15</sup>

between employer and employee—the knowledge and cooperation that came from personal contact. It is therefore no longer possible to conduct industry by dealing with employees as individuals. Some form of collective relationship between management and men is indispensable. The recognition of this principle by the Government should form an accepted part of the labor policy of the nation.

"3. Law, in business as elsewhere, depends for its vitality upon steady enforcement. Instead of waiting for adjustment after grievances come to the surface there is needed the establishment of continuous administrative machinery for the orderly disposition of industrial issues and the avoidance of an atmosphere of contention and the waste of disturbances."

*Report of President's Mediation Commission to the President of the United States*, pp. 20-21.

<sup>13</sup> U. S. Bureau of Labor Statistics, *National War Labor Board*, Bulletin No. 287, pp. 27-28.

<sup>14</sup> *Ibid.* The recommendation approved collective bargaining through trade unionism. But the National Industrial Conference Board used collective bargaining to refer to bargaining through trade unionism or employee-representation plans, and preferably the latter. The Board insisted that a truce be drawn by organized labor and management for the duration of the war. Neither side would attempt to change the *status quo*. The AF of L agreed. Also see National Industrial Conference Board, Inc., *Collective Bargaining Through Employee Representation Plans*, pp. 1-18.

<sup>15</sup> The principles followed by the Board were:

1. There were to be no strikes or lockouts for the duration of the war.
2. Workers had the right to organize in trade unions, and employers in associations. Each could bargain through representatives. The employers should not discharge for "legitimate trade-union activities." Workers were not, in the exercise of their right to organize, to use coercive measures of any kind to induce persons to join their organizations nor to induce employers to bargain or deal therewith. The *status quo ante* was to be maintained.

(Continued on p. 8.)

Organized labor made great gains during the war period because of the existence of the War Labor Board. Too, there was much similarity between the procedure used by the National Labor Relations Board created in 1935 and the procedure used by the War Labor Board. The War Labor Board was composed of five representatives of employers, five representatives of labor, two representatives of the public, and a panel of ten umpires. The Board's jurisdiction extended to *all fields of production* necessary for the effective conduct of the war, and this meant in practice that fewer than fifty complaints were dismissed by the Board on the ground that war production was not involved. For practical purposes, all industry was included except those industries where other means of settling controversies were available. The Board's objective was to remove the causes which would interrupt production; and to do so it was to serve as an adjudicating body to define mutual rights and duties, to mediate, conciliate, and arbitrate. In practice the Board seldom acted in a conciliatory capacity; rather, the real function of the Board was to serve as an industrial supreme court for the duration of the war, to which complainants brought their cases and requested adjudication of them.

The Board's cases originated with decisions of other boards, by reference from other agencies, and by complaint. Most cases came via the complaint. A written complaint form was used, and a copy was served on the defendant. After notice, a hearing was held, presided over by a judicial examiner. The judicial examiner was used because the Board could not accomplish its work with-

3. Employers were forbidden to discriminate against workers because of membership in unions or for legitimate trade-union activities, and in a number of cases where such discharges occurred the Board ordered the reinstatement of the workers with compensation for all that they had lost by reason of their discharge.

4. The employer was under no obligation to recognize the union; but the workers had a right to organize for collective bargaining, and it was the duty of the companies to recognize and deal with committees after they had been duly constituted by employees.

5. Secret elections under the supervision of an examiner were to be held to ascertain representatives.

6. As a rule, the employer was not obliged to contract with a union or with a representative of the employees who was not himself an employee, unless the employer had been so acting prior to the submission of the controversy to the Board.

Drawn from U. S. Bureau of Labor Statistics, *National War Labor Board*, Bulletin No. 287.

out the aid of assistants, and the examiner was thus relied upon to go into the field and hold the hearing. The hearing itself was held under Board rules, which required judicial processes; the examiner was instructed to follow as nearly as possible the rules of evidence prevailing in common-law courts, with such departures as might seem necessary "in the cause of speedy justice." The examiner was to require witnesses to confine their testimony to statements of facts within their personal knowledge. There was a transcript of the hearing, from which the examiner digested the evidence for presentation to the Board. The Board would sometimes hold hearings to clear up points not clear in the record, but ordinarily the Board's decision depended upon the written report of the expert examiner.

The Board, after studying the case, would render its decision with recommendations. It had, however, no powers of enforcement, but the exigency of war rendered the lack of enforcement powers not too much of an obstacle. Public opinion, at war-time fever, was a powerful force making for compliance with the Board's recommendations. But more, the "production departments," such as the War and Navy Departments, and the President had powers which could be used to enforce the recommendations. Three cases stand out:

In the *Western Union Telegraph Company* case, the *Bridgeport* case, and the *Smith & Wesson Company* case, the defendants refused to comply with the decision of the Board. The President publicly requested the strikers (defendants) in the *Bridgeport* case to return to work. Their refusal led the President to threaten them with ineligibility to use the Federal Employment Service, and this brought capitulation. In both the *Western Union* and *Smith & Wesson* cases the President requested the companies to abide by the Board's decision. The companies refused, whereupon, in the *Western Union* case the Government took over the company for the duration of the war, and the War Department commandeered the *Smith & Wesson* plant. Ordinarily such stringent measures were not necessary; but the Board, after rendering a decision and recommendation, often used an examiner in the field to implement the award made.

During the war, as well as after, there was no common agree-

ment on the definition of collective bargaining or the place of the independent organization. The War Labor Board, as it approached the problem, probably more than any other factor laid the foundation for the company unionism which was to have such a growth during the twenties and which was to cause so much difficulty for the various labor boards in later years. With organized labor none too strong, the Board representatives would recognize the need for representation in a plant but would be in a quandary as to how to solve the problem. The shop-committee which was in existence in a great many instances provided the answer, and often administrators would spend many weeks building shop-committee plans in order that there might be representation.<sup>16</sup> While the Board was opposed to individual bargaining, both organized labor and the shop-committee were envisaged as proper machinery for collective bargaining; and since it did not recognize the shop-committee as a "company union," it would often encourage the shop-committee in order to carry out the objective of maintaining the *status quo ante*.

The War Labor Board functioned throughout the war period. Other Federal agencies, such as the Shipbuilding Labor Adjustment Board, followed the principles set forth by the War Labor Board. The Board went out of existence in 1919 when, after the war ended, it lost the confidence of both the employers and employees. Designed less to protect the growth of unionism than to prevent any opportunistic growth of labor organizations, the War Labor Board did bring the recognition of collective bargaining in national life. Protection was accorded the right of the worker to organize and freedom of choice in the selection of bargaining representatives. The necessity for the Board's organizing shop-committees indicated the absence of any broad desire on the part of workers to organize; and this laid the foundation for company unionism, since the shop-committee plans were to be often too successful to dispense with after the stringency of

<sup>16</sup>"... Often the parties in such cases were completely at a loss as to how to proceed in such a system and imperatively needed counsel with some one familiar with the processes of installing shop-committee systems. Administrators were sometimes obliged to spend months building up systems of representation of workers so that there might be proper persons with whom to deal on behalf of the employees." U. S. Bureau of Labor Statistics, *Op. Cit.*, p. 25.

war passed but unions remained. The procedure used by the Board was important because of its similarity to that used by later boards.

The economic repercussions of the war brought on a large number of industrial disputes in 1919. Hoping to solve the problem of "labor and capital," President Wilson formed the National Industrial Conference in October, 1919, which included an employers' group, a labor group, and a public group. The conference collapsed over the definition of collective bargaining; but the public group, headed by Bernard Baruch, wrote the President its support of collective bargaining and recommended that another conference be held.<sup>17</sup>

The second conference was composed of public representatives only and included such men as William Wilson, Herbert Hoover, Julius Rosenwald, Frank Taussig, George Wickersham, Owen D. Young, and Henry Seager. Among other recommendations, the conference listed the policy of collective bargaining.<sup>18</sup> No governmental reaction in the sense of public-policy expression resulted. Apparently the weight carried by such commissions as those considered here is small and adds little to the creation of legislative policy.

<sup>17</sup> The collapse of the conference originated in the divergent concepts of collective bargaining. To the unions, collective bargaining meant the employer dealing with trade unions; to the employers, collective bargaining included the shop-committee plans.

In writing the President, the public group said:

"In this connection we deem it important to emphasize . . . that the conference did not . . . reject the principle of the right of workers to organize and bargain collectively with their employers . . . The difficulty was not the principle involved but upon the method of making it effective. [i.e., trade unions v. shop councils.]

"We believe that the right of workers to organize for the purpose of collectively bargaining with their employers through representatives of their own choosing cannot be denied or assailed. As representatives of the public we can interpret this right only in the sense that wage-earners must be free to choose what organization or association, if any, they will join for this purpose." *New York Times*, Oct. 25, 1919, p. 2.

<sup>18</sup> "An analysis of the heated controversies . . . indicates that the employees place the emphasis on the *right* of wage-earners to bargain collectively, and that the employers place the emphasis on the *right* of employers to bargain or refuse to bargain collectively at their discretion. . . . The real question, however, is whether, as a matter of policy, better relationships between employers and employees will be promoted . . . if a system of collective bargaining is adopted." *Report of Industrial Conference called by the President, 1920*, pp. 30-31. Italics supplied.

## D. Railway Labor Legislation and the Norris-La Guardia Act

Far more important than the recommendations of various commissions was the experience in the field of railroad legislation, to which may be attributed considerable weight in bringing the passage of the National Labor Relations Act. Fundamentally, this importance was due to the public demand that there be no preventable stoppages in the railroad industry and to the strength of the railroad labor unions. Thus, collective bargaining grew and flourished with less difficulty in the railroad field. Because of its importance, the railroad experience must be traced.<sup>19</sup>

### 1. *The Act of 1888*

The first legislation designed to improve relations between employers and employees on the railroads was the Act of 1888, which provided for an investigation commission in the event of a strike and an arbitration board if the parties agreed to arbitrate. In the following ten years there was but one investigation (of the Pullman strike) and no case of arbitration. The only important result of the Act lay in the fact that it was the beginning of Federal legislation, and there was at least implicit recognition in the arbitration provisions that employees through representatives could be viewed as bargaining entities.

### 2. *The Erdman Act*

In 1898 the Erdman Act was passed. While this Act was primarily to provide for conciliation and mediation by the Government, the arbitration provisions of the 1888 Act were incorporated and strengthened. Labor organizations only were to execute arbitration agreements, although there were certain exceptions designed to care for unorganized groups who could show convincing responsibility to abide by any agreements to which they were a party. Section 10 of the Act prohibited "yellow dog" contracts. It was made a misdemeanor to "require any employee or any

<sup>19</sup> For material on the subject, see U. S. Bureau of Labor Statistics, *Use of Federal Power in Settlement of Railway Labor Disputes*, Bulletin No. 303; the annual reports of the National Mediation Board, 1935-1940 inclusive, especially the 1935 report; Soc. Sci. Research Council, *Railway Labor Survey*; Twentieth Century Fund, Inc., *Labor and the Government*, Chap. VIII.

person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association, or organization; or [to] threaten any employee with loss of employment or unjustly [to] discriminate against any employee because of his membership in such labor corporation, association, or organization." This section, however, could not hurdle the 1908 Supreme Court, which held it to be unconstitutional on the grounds that it was an invasion of personal liberty and in violation of the fifth amendment. But in a dissenting opinion, Mr. Justice Holmes penetratingly said:

"It can not be doubted that to prevent strikes and . . . to foster its scheme of arbitration it might be deemed by Congress an *important point of policy*, and, I think, it impossible to say that Congress might not reasonably think the provision in question would help a good deal to carry its policy [to prevent interruption of traffic in interstate commerce] along."<sup>20</sup>

Despite Holmes' desire for the enactment of a statement of legislative policy, the first Federal statutory recognition of labor's right to organize, though confined only to the railroad industry and even there to those engaged in operation of trains, was destroyed. This Act remained in effect, however, until 1913 and was attended with success, since the mediation and conciliation provisions were especially useful for the settlement of labor disputes.

### 3. *The Newlands Act*

In 1913 the Newlands Act was passed. It provided for a permanent Board of Mediation but otherwise largely was a rewrite to improve the Erdman Act. The Act definitely established mediation as the primary machinery for settling railway labor disputes, and the Act may be said to have been successful in that respect. The Act failed, however, to provide machinery capable of resolving the controversy over the eight-hour day; and in 1916 Congress took direct action and enacted the Adamson Act, which provided in principle the eight-hour day for train operatives.

<sup>20</sup> *Adair v. United States*, 208 U. S. 161 (1908). Italics supplied.

Congress could and would, it thereby revealed, take drastic action to settle labor disputes should the occasion demand.

#### 4. *The Railroad Administration*

The outbreak of war brought in 1918 the creation of the Railroad Administration, with a director general at its head. General Order No. 8, issued by the director general early in 1918, declared that "no discrimination will be made in the employment, retention, or conditions of employment of employees because of membership or nonmembership in labor organization." This order ran counter to the decision in *Adair v. United States* and led to a pronounced growth in union membership, plus a general strengthening of union organization.

Further, the Railroad Administration signed national agreements with the Brotherhoods and with other classes of employees as they grew stronger as a result of General Order No. 8. Also very important was the organization by the Railroad Administration of boards of adjustment for the purpose of settling disputes over the interpretation or application of wage schedules and agreements—important because the employees and employers had to try to settle their difficulties in committee before going to the adjustment boards. The policies and practices of the Administration conditioned the unions and railroad management to the idea of negotiation and recognition, and the Administration clearly recognized labor's right to organize.

While the railroads were under Government control, the right to bargain collectively and the prohibition of discrimination in employment because of union membership were demonstrated public policies for the railroad industry.<sup>21</sup> Parallel policies, as indicated above, were promulgated by the War Labor Board for other industries while under the exigencies of war. It was the experience and the policies of the Railroad Administration which were later to be the basis of the 1926 Railway Labor Act.

<sup>21</sup> It may be argued that true collective bargaining was not engaged in, since the Director General established and standardized rules, working conditions, and wages for several classes of employees, instead of leaving these subjects to negotiation. But when conditions, rules, or wages were established, regard was had for the demands of organizations. The important issue here was the guarantee of the right to organize free of carrier interference.

### 5. *The United States Railroad Labor Board*

In 1920, when the railroads were returned to private management, it was felt that there should be legislation designed to bring about the solution of labor disputes. Therefore, in the Transportation Act of 1920 provisions were incorporated which looked toward the adjustment of labor relationships as part of the regulatory process. In essence, the legislation created the United States Railroad Labor Board to deal with disputes, but the Board was to enter the scene only after the employers and employees through their representatives in conference had attempted and failed to reach a solution. The Board was then to hear and render a decision in the case. Public opinion was relied upon to enforce the decision. Carriers and employees were authorized to set up adjustment boards for interpretation of agreements made but were not required to do so. The Act did not make conferences obligatory between the representatives of the carriers and employees; but there was no prohibition of employer interference in the choice of representatives, nor was there prohibition of coercion by the carrier to force the employee to cease union activity, although such prohibitions sometimes were handed down in cases.<sup>22</sup>

### 6. *The Railway Labor Act*

By 1925 the Railroad Labor Board was useless. The carriers and employees jointly supported the bill which, when passed, was the Railway Labor Act of 1926.<sup>23</sup> This Act was primarily to create machinery for mediation and voluntary arbitration, and an emergency board in the event mediation and arbitration did not settle the dispute. The Act fundamentally assumed that carriers and employees through their representatives would reach agreements, and the governmental machinery was a safety valve in the event the assumption was not always borne out in practice. The use of economic power was to be the last resort. The Act provided that

<sup>22</sup> Company-sponsored representation plans grew rapidly, and there was disagreement by management and labor on interpretation of the Act. The Pennsylvania Railroad insisted that the Act was to provide the carriers with the right to bargain individually, and the Supreme Court eventually sustained the carrier. The Board was not wholly successful, the Act was ambiguous, and organized labor opposed the legislation because it curtailed bargaining activity.

<sup>23</sup> 44 Stat. L. 577.

neither side was to refuse to confer with the properly chosen representatives of the other and neither was to interfere in any way with the freedom of the other to choose its representatives. This was a genuine attempt to promote and encourage collective bargaining.

Shortly, however, came the problem of company-union representatives v. national-union representatives, for there was no prohibition of the company union under the Act. In the important decision handed down by the Supreme Court in the case of *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*,<sup>24</sup> the court upheld a lower-court injunction, which prohibited the carrier's support of a company union and affirmed constitutionally the right of the men to be represented by officers of a national union. Here, then, was for the first time a statutory enactment providing for independent choice of representatives and self-organization for purposes of collective bargaining, sanctioned by the Supreme Court. Thus, the forces of law stood ready and willing to protect the rights of labor. Congress had endeavored since the Act of 1888 to set up machinery for settlement of disputes by negotiation; but only with the Railway Labor Act of 1926, as upheld by the courts, did Congress enact into public policy protection of the right to organize and bargain collectively in the railroad industry.

### 7. *The Norris-La Guardia Act*

A more extensive declaration of public policy came from Congress in the Norris-La Guardia Act of 1932, an Act which was

<sup>24</sup> 281 U. S. 548 (1930). This is one of organized labor's most important legal victories. In sustaining legislation that was to protect rights, the Court said unanimously:

"In shaping its legislation to this end [*i.e.*, to adjust labor disputes], Congress was entitled to take cognizance of actual conditions and to address itself to practicable measures. The legality of collective action on the part of employees in order to safeguard their proper interests is not to be disputed. It has long been recognized that employees are entitled to organize for the purpose of securing the redress of grievances and to promote agreements with employers relating to rates of pay and conditions of work. . . . Congress was not required to ignore this right of the employees but could safeguard it and seek to make their appropriate collective action an instrument of peace rather than of strife. Such collective action would be a mockery if representation were made futile by interferences with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both."

passed as a result of the strength of organized labor.<sup>25</sup> Section 2 of the Act declared:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, therefore . . ." (Sections follow limiting and defining the jurisdiction and authority of the Federal courts.)

This Act primarily deals with labor activities and the issuance of the injunction by Federal courts, but Section 3 of the Act made "yellow dog" contracts unenforceable in Federal courts because they were contrary to stated public policy.

#### *8. The 1934 Amendments to the Railway Labor Act*

The Railway Labor Act, plus the *T. & N.O.* decision, plus the expression of public policy in the Norris-La Guardia Act might have led normally to an expectation that no more problems concerning organization rights would arise between railroad labor and the carriers. But such an expectation was not to be borne out by events. Coordinator of Transportation Eastman, whose office and appointment originated in the Emergency Transportation Act of June 16, 1933, found upon investigation that many carriers were guilty of some or all of the following practices in, let it be remembered, a field where organized labor had tremendous strength: The carriers formed employee organizations and controlled constitutions and bylaws; they supervised the choice of

<sup>25</sup> 47 Stat. L. 70. This declaration of policy is important because it was quoted as precedent in subsequent legislative attempts leading up to and including the enactment of the Wagner Act.

representatives; they supervised and prescribed methods of electing representatives; they contributed financial support; they paid representatives of employees as such; they collected dues; they extended special privileges to members of company unions; they clearly used coercion to prevent the employee from using free choice in the selection of the labor organization or representatives; they discriminated against employees for membership or non-membership in a labor organization—in short, the carriers were guilty of the whole gamut of such practices as would prevent the growth of organized labor and freedom in organization and collective bargaining.

The practices outlined were thought by Coordinator Eastman to be prohibited by the Railway Labor Act, and he ordered the guilty carriers to cease and desist. Further, elections were held on some roads to determine whether a majority desired the standard railroad unions to represent them, and where this was found to be the case the carriers were ordered to recognize representatives for purposes of collective bargaining. This action by the Coordinator broke the strength of company unions on the carriers of the nation.<sup>26</sup>

The origin of the powers exercised by the Coordinator may be considered because of the statement of policy contained therein. Such consideration also permits a picture to be drawn of public policy as it related to one exceptional industry, exceptional in the sense that the railroad industry does have extensive public character, and there was a strong and well-developed, disciplined, and orderly labor movement in the industry.

The powers of the Coordinator derived from the Emergency Railroad Transportation Act; and this Act, with regard to labor, specified in Section 7(e) that "carriers . . . shall be required to comply with the provisions of the Railway Labor Act and with [sections of the amending act to the Bankruptcy Act]."<sup>27</sup> Section 7(a) provided that labor organizations should create regional committees to cooperate with the carriers' coordinating committees; Section 7(e) authorized the Coordinator to create regional Boards of Adjustment where conditions warranted; Section 10(a)

<sup>26</sup> See Twentieth Century Fund, Inc., *Labor and the Government*, pp. 186-189; also *New York Times*, Dec. 9, 1933, p. 23.

<sup>27</sup> 48 Stat. L. 211.

relieved carriers from the operation of the antitrust legislation; Section 12 provided that employees could individually or collectively refuse to render service; Section 13 made it the duty of the Coordinator to investigate and recommend to Congress how to improve transportation conditions, including "the stability of railroad labor employment and other improvement of railroad labor conditions and relations." Sections 7(e) and 13 were to form the basis of the 1934 amendments to the Railway Labor Act, and Section 7(e) required compliance with the Bankruptcy Act as amended, Section 77, paragraphs (o), (p), and (q). The Bankruptcy Act had been amended March 3, 1933, and the pertinent sections required, respectively:<sup>28</sup>

(o) No judge or trustee under the Act should change wages or working conditions, except in the manner prescribed in the Railway Labor Act or by the Illinois agreement of January 21, 1932.

(p) No judge or trustee should deny or in any way question the right of employees to join the labor organization of their choice. It was made unlawful for a judge or trustee to interfere in any way with the organization of employees, to use carrier funds to maintain "so-called company unions, or to influence or coerce employees in an effort to induce them to join or remain members of such company unions."

(q) No judge, trustee, or receiver should require any person to sign a "yellow dog" contract; and if such a contract were in force when the property came under the jurisdiction of the judge, trustee, or receiver, the employees were to be notified that the contract had been discarded and was no longer binding in any way.

Thus, the Bankruptcy Act amendment statutorily protected labor's rights under the Railway Labor Act in a narrow way, and the Emergency Act broadened the protection to include all carriers. But because the Emergency Act was temporary and the Coordinator's enforcement powers under the act were uncertain, and because of a desire to destroy the last vestiges of unlawful carrier activities, the Coordinator by virtue of Section 13 of the Emergency Act recommended to Congress that the 1926 Railway Labor Act be rewritten. This was done and enacted as the 1934 amendments, and the present public policy as it related to the

<sup>28</sup> 47 Stat. L. 1467.

railroad industry may be reviewed by giving consideration to the Railway Labor Act as amended in 1934:<sup>29</sup>

1. The purposes are to avoid any interruption to commerce or carriers engaged therein; to forbid any limitation upon freedom of association among employees or any denial of the right of employees to join a labor organization; to provide for complete independence of carriers and employees in the matter of self-organization; to provide for prompt and orderly settlement of all disputes, primary and secondary, concerning rates of pay, rules, or working conditions.
2. In principle, employees and carriers are to exert every effort to make agreements by conference and conciliation. The duty is imposed on the parties to make and maintain written contracts which are to be filed with the National Mediation Board, as are any changes in the contracts.<sup>30</sup>
3. The collective bargaining agreements are to cover the whole of a craft or class of employees provided the agreement is made by a labor organization having at least a majority of employees, who specifically have the right to bargain collectively through representatives of their own choosing. The act imposes upon the employer the duty to refrain from trespassing on the right of organization. Interference, influence, or coercion exerted by either party in the choice of representatives is prohibited. The agreement may be made by the employee representative whether the representative be a person, labor union, organization, or corporation, who need not be in the employ of the carrier.
4. The carrier, its officers or agents, are prohibited from denying or in any way questioning the right of its employees to join, organize, or assist in organizing a labor organization of their choice; and it is

<sup>29</sup> Public No. 442, 73rd Congress, 2d Session. The act was amended in 1935 to include common carriers by air. Identical in principle, the 1935 amendment provides appropriate machinery for adjustment of disputes in the air-transport industry. 49 Stat. L. 1189.

The constitutionality of the 1934 amendments was unanimously established by the Supreme Court in *The Virginian Railway Co. v. System Federation No. 40, Railway Employees Department of the American Federation of Labor*, 300 U. S. 515 (1937).

<sup>30</sup> The law will not force a party to sign a contract against his own will, hence the Act does not in words specify that the parties must meet, make, and sign contracts. But the Act does assume that contracts will be made and signed. See First Annual Report, National Mediation Board, p. 28.

It is not clear just why the contracts must be filed with the Board, unless such action is regarded as a lever to aid in the culmination of such contracts. No analysis nor use has been made of the filed contracts, but in 1940 and 1941 the Board requested sufficient funds from Congress to enable the classification and analysis of the 4,000 filed contracts. This was thought desirable because mediators could better perform their functions through more knowledge and also because

unlawful for the carrier to interfere in any way with the organization of its employees.

5. "Yellow dog" contracts are made illegal.
6. Carriers are prohibited from using funds to maintain any employee organization, or paying representatives, or deducting from wages, or helping to collect any dues, fees, assessments, or contributions payable to labor organizations.

7. Violations of the right to organize, or interference, influence, or coercion by one party with the choice of representatives of the other is made a misdemeanor punishable by fine or imprisonment or both. This provision was absent in the 1926 Act, although the *T. & N.O.* decision demonstrated that equity proceedings might be used for enforcement.

8. The National Mediation Board was created and functions as the governmental agency in the event of dispute between labor organizations as to representation. Upon the request of either labor group to a dispute, the Board investigates and certifies to both the parties and the carrier the proper representative for bargaining purposes. It is then incumbent upon the carrier to treat with the representative of the craft or class of employees, and only the employees have the privilege of calling upon the Board to certify the proper representative. The Board, to perform this function, may use secret ballot or any other "appropriate method . . . as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier." If the election method is used, the Board decides who may participate and what the rules shall be. The Board may have access to carrier records and books for vote purposes.

9. The National Mediation Board acts as a mediation agency between carriers and organizations when agreements are being changed or drawn anew.

10. The National Railway Adjustment Board of thirty-six members was created, composed of an equal number of representatives from the carriers and the labor organizations. The Board's function is to settle disputes growing out of the interpretation of existing agreements.

11. The legislation provides that where primary disputes are not settled by mediation, voluntary arbitration with a binding award may be used.

12. If mediation and arbitration fail to resolve primary disputes and an interruption to commerce is threatened, the National Mediation Board must notify the President, who appoints an emergency board to investigate and report within thirty days. For thirty days after the

information could be had regarding the terms of standard and local agreements. See H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, pp. 412-413.

report, the parties may not change the conditions out of which grew the dispute.

It is clear that the culmination of the railroad legislation and experience was an unequivocal protection of labor's right to organize and bargain collectively. More than half a century of debate, trial and error, and congressional deliberation is bound up in the statements of purpose, the public policy set forth, and the machinery created to effectuate the purposes and policy. There is still opposition to the present machinery and legislative policy,<sup>31</sup> and the situation in the railroad industry is not the definitive answer to employer-employee problems. But the experience in the railroad field does indicate the development in one area, and it is demonstrable that the National Mediation Board and the National Railway Adjustment Board, with a difficult task to perform despite the discipline of the railroad labor unions, function with a high degree of success.<sup>32</sup>

For the development and passage of the National Labor Relations Act the railroad experience was of prime importance, and the two legislative provisions may be compared in many respects. It is, however, wrong to reason that the National Labor Relations Act is the proper implement for collective bargaining on the basis of its similarity to the railroad legislation, for the two enactments deal with noncomparable situations; and just how far the experience on the railroads may be transferred to the general field of industry is indeed questionable.<sup>33</sup> The railroad experience did act as a guide in the formation of the National Labor Relations Act.

<sup>31</sup> The carriers opposed the 1934 amendments on the grounds that the existence of the Adjustment Board meant compulsory adjustment. Organized labor answered that the primary agreements were still the result of negotiation and that the Adjustment Board was only adjudication machinery for the agreements.

<sup>32</sup> But the reputation of the National Mediation Board would fade completely if carriers began interfering with, restraining, or coercing employees in order to fight unions. Since the Act is enforceable only through the courts, an intolerable strike situation might develop from any employer attempt to discriminate for union activity. The Board does not protect employees from employer interference.

<sup>33</sup> Senator Wagner testified on the proposed Wagner Act: "The intent here is to bring about in industry generally the same conditions which Congress decreed for the railways and businesses under trusteeship by the 1933 amendments to the Bankruptcy Act, the act creating the office of the Federal Coordinator of Transportation, and the 1934 amendments to the Railway Labor Act." S. Hearings on S. 1958, 74th Congress, 1st Session, Part I, p. 40.

### E. The National Industrial Recovery Act<sup>34</sup>

The negative statement of public policy in the Norris-La Guardia Act was until 1933 the clearest legislative pronouncement which applied to labor generally. In part it was a genuine expression of liberal forces, in part a result of AF of L support of it, and in part a congressional attempt to bring economic recovery. Despite this prop to organized labor, union enrollments were shrinking early in 1933, and individual bargaining was the foremost type of employer-employee negotiation. Even company unions, which theretofore had been fairly active, especially through the 'twenties, became somewhat inactive as the depression deepened. The Bankruptcy Act, amended in March, 1933, had been a slight aid for the forces of organized labor; and the Emergency Railroad Transportation Act had greatly increased the scope of applicability of the principles in the Bankruptcy Act amendments. The Emergency Railroad Act was approved the same day as was the National Industrial Recovery Act, and it was from the latter legislation that the National Labor Relations Act stemmed.

The National Industrial Recovery Act, approved June 16, 1933,<sup>35</sup> was an attempt by the administration to meet economic depression through removal of proscriptions set up by antitrust legislation and thus permit business to organize and to control prices. Organized labor, however, was noncooperative with regard to the contemplated National Industrial Recovery Act unless it, too, was to be permitted the same collectivistic character that business was adopting. The leaders in the administration, anxious to get cooperation by all important parties, recognized that the AF of L would have to receive some concessions in return for its cooperation. What did the AF of L desire?

#### 1. *The AF of L Objective*

The leadership of the AF of L—not the rank and file, for it had no real knowledge of issues and events—had before it the Norris-

<sup>34</sup> For much background material on the National Labor Board and the first National Labor Relations Board, the writer is indebted to Lorwin & Wubnig, *Labor Relations Boards*, The Brookings Institution.

<sup>35</sup> Public No. 67, 73rd Congress, 1st Session.

La Guardia Act and the accomplishments in the railroad field. Its major objective was to remove the "yellow dog" contract and to obtain protection so that it would not have legal obstructions in fighting the company unions. It is not even clear that the AF of L desired employee-representation plans abolished; and there was little or no discussion during the hearings on the important issues in labor relations such as recognition, majority rule, the bargaining unit, collective bargaining, and the closed-shop. Rather, the chief objective sought was the removal of barriers; no active and positive aid was desired of the Government. The company union was one of the real obstacles; and, therefore, it was necessary that in the proposed legislation there be such a statement as would constitute public affirmation of the right of the employee to be free of employer domination.

The original bill embodying the provisions which finally became the N.I.R.A., in Section 7(a), the labor provision, provided (1) "That employees shall have the right to organize and bargain collectively through representatives of their own choosing" and (2) "that no employee and no one seeking employment shall be required as a condition of employment to join any organization or to refrain from joining a labor organization of his own choosing."<sup>36</sup> During hearings on the bill, William Green of the AF of L requested that the first provision be amended so as to read: "and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>37</sup> This amendment was adopted.

With respect to the second provision above, Mr. Green requested that instead of reading "any organization," it should read "company union." This was desired "in order to make clear and definite the real meaning and purpose of this part of the act."<sup>38</sup> The amendment would then have read "to join any company union or to refrain from joining, organizing, or assisting a labor

<sup>36</sup> H.R. 5664, 73rd Congress, 1st Session.

<sup>37</sup> H. Hearings Before the Committee on Ways and Means, 73rd Congress, 1st Session, pp. 117 ff.

<sup>38</sup> Such an amendment would forestall any possible interpretation that the Act outlawed the closed-shop if it specified "company union" as being that which the workers did not have to join. *Ibid.*

organization of his own choosing." It would prevent an employer from compelling his employees to join an organization he favored, or perhaps controlled, or to refrain from joining an organization the employer disliked. Then, Mr. Green said, "If the industrial recovery act is amended, as herein suggested, labor will extend to this proposed legislation its full, complete, and hearty endorsement."

Senator Wagner was one of the leaders of the proposed legislation and was especially interested in the labor angle. Mr. James Emery, of the National Association of Manufacturers, proposed that the right of the individual to bargain be protected, as well as the right of the individual not to join a labor organization. Mr. Harriman, of the United States Chamber of Commerce, thought Section 7 should be amended to insure open-shop principles.<sup>39</sup>

The Senate Committee inserted a proviso in the bill, in answer to a demand from employers, to the effect that the Act would not compel a change in existing satisfactory relationships between employers and employees. This proviso would protect employee-representation plans. It would also broaden the protection for the individual beyond that afforded by the House when it added after the phrase "to join any company union," the words "or to refrain from joining, organizing, or assisting a labor organization of his own choosing."<sup>40</sup> In conference committee, however, the proviso was dropped, and Section 7(a) of the N.I.R.A. was passed as it was agreed upon in conference.<sup>41</sup> There was some small debate in the House to include "existing satisfactory relationships" and much debate in the Senate on the same issue.

The labor provisions of the N.I.R.A. were not the result of a

<sup>39</sup> Before the Committee, Senator Wagner said: "All we are saying is that if laborers so choose they may bargain collectively. That is a right the court has said they have and they have upheld contracts for collective bargaining, and the only thing we say is if they care to assert it, they have the right to collective bargaining and if they do not they can deal otherwise with their employers."

John L. Lewis testified: "There is nothing in section 7 that will destroy the company union as it now exists in any plant. If the employees of that plant want to remain members of a company union, all there is in that is that the Bethlehem Steel Company cannot, as a condition of employment, force those employees to join a company union, or discharge them, or penalize them if they refuse to do so."

Hearings Before the Committee on Finance, U.S. Senate, 73rd Congress, 1st Session, on S. 1712 and H.R. 5755.

<sup>40</sup> S. Report No. 114, on H.R. 5755, 73rd Congress, 1st Session, pp. 2-3.

<sup>41</sup> S. Doc. No. 76, on H.R. 5755, 73rd Congress, 1st Session.

broad demand that the individual be protected from the industrialist who did not approve of trade unionism but were directly related to AF of L political power. Other strands of influence may be indicated.

The role of Senator Wagner was outstanding, since he was in charge of labor legislation for the administration. But others played a part. In early 1933, the administration was beset with a plethora of recovery proposals, and out of the assortment Donald Richberg and Hugh Johnson drafted a short bill incorporating certain threads running through many of the proposals. Mr. Richberg drafted the labor provisions. In 1923, Mr. Richberg had drafted the essence of the Railway Labor Act of 1926, and he had briefed and argued the *T. & N.O.* case in the Supreme Court for the railroad unions.

At a presidential conference, Mr. Richberg thought divergent proposals might be brought together in a single bill; and to accomplish this the President appointed a subcommittee composed of Perkins, Tugwell, Dickinson, Douglas, Wagner, Johnson, and Richberg. The three last-named really worked out the details of the N.I.R.A. All had had considerable years of experience, legal and otherwise, and should have been well aware of forces, designs, and objectives of different groups.<sup>42</sup> Moreover, Mr. Frey, of the AF of L, and Mr. McGrady, one of the leading conciliators in the Department of Labor, reviewed the proposed legislation. The part played by Mr. Green in the congressional hearings has already been indicated. To render credit, or responsibility, to one person is impossible, for all the men mentioned shared joint responsibility, especially Richberg, Johnson, Wagner, Frey, and McGrady. The AF of L's voice was at all times of first importance, since it was speaking for organized labor. There has been considerable rumor to the effect that 7(a) was a "deal" between business and labor—*i.e.*, Labor would aid Business by approving the relaxation of antitrust legislation in return for Business giving to Labor a clear path for organization. There is no evidence to support such rumor. Rather, it was a matter of a group of responsible persons endeavoring to obtain cooperative action,

<sup>42</sup> Donald Richberg has written that the legislation was not hasty nor ill-considered and that neither organized labor nor organized employers had any responsibility in drafting the legislation, that indeed both organized groups were critical. See Mr. Richberg's book, *The Rainbow*, Doubleday, Doran and Co., Inc., pp. 45 ff.

which, they knew, would require a consideration of the rights of all parties. While the difference between cooperation and "dealing" is here a matter of emphasis, it is worth while to point out the distinction. If any group visualized a *quid pro quo* arrangement, it was the members of Congress, and they had no crystallized notions as to collective bargaining.

## 2. Section 7(a)

The Recovery Act's stated purpose in regard to labor was ". . . to reduce and relieve unemployment, to improve standards of labor . . ." Section 7(a) included the labor provisions:<sup>43</sup>

". . . (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid and protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment."

Part (b) of the Section provided for presidential encouragement of mutual agreements between employers and employees in a trade or industry, the agreements to concern standards and conditions of labor and, when approved by the President, to have the same effect as approved codes. Part (c) enabled the President, where agreements under (b) were absent, to investigate and establish as a result thereof such standards and conditions of labor as a code as would effectuate the stated policy. Differentials were permissible.<sup>44</sup>

This N.I.R.A., which organized labor regarded as another "Magna Charta," really did not prevent company domination of

<sup>43</sup> 48 Stat. L. 195.

<sup>44</sup> Said the President when the act was passed: "This law is also a challenge to labor. Workers, too, are here given a new charter of rights long sought and hitherto denied. . . . This is not a law to foment discord and it will not be executed as such. . . ." *Public Papers and Addresses of Franklin D. Roosevelt*, Random House, Vol. II, p. 253.

unions; it did not outlaw the company union; it imposed no duty on employers to meet with representatives; it did not encourage organization; it did not protect the unions and employees; there were no separate enforcement provisions for violations even remotely comparable to the Railway Labor Act; there was no proscription against the use of company funds for maintenance of a labor organization. Employers had reason to regard 7(a) as saying no more than that men could join organizations of their own choice; the AF of L could, especially in light of its contribution, regard 7(a) as the right to self-organization and collective bargaining in terms of usual AF of L practices—in short, the section had something of the character of being “all things to all men,” with the weakness of not affording effective protection. And, despite the defense of Mr. Richberg that the legislation was not hasty, Section 7(a) was enacted without a consideration of the important issues, the resolution of which would at least be in part dependent upon interpretation. Still the enactment of 7(a) was a significant action by Congress, for it was the first legislative enactment applying to industry generally which stated positively that collective bargaining and unionism had a place in industry and hence was a step beyond the negative approach of the Norris-La Guardia Act. But that Congress hesitated to accept and adopt protective measures for trade unionism with complete confidence is shown by the fact that the Emergency Railroad Transportation Act, which carried far more complete protection for railroad labor than 7(a) of the N.I.R.A. carried for labor generally, was adopted by Congress on the same day as it approved the N.I.R.A. Yet one Act was comparatively precise and direct, the other was to be noted for its ambiguity.

### *3. The Creation and Development of the National Labor Board*

The N.I.R.A. was meant to bring about the reemployment of persons and economic recovery. To organized labor, the act was encouragement for collective bargaining, and the AF of L began immediately to organize more workers into the unions. It was fairly easy to convince the workers, too, that the President desired all workers organized into unions. But the justification for the organizing campaigns hinged upon only the AF of L interpreta-

tion of 7(a); to the employers the section approved individual bargaining or employee-representation plans, and this meant strong opposition for the AF of L.<sup>45</sup> The result was not only that the AF of L greatly expanded its organization work but that the employee-representation plans mushroomed too, with an increased opposition to organized labor. Strikes, riots, and bloodshed began to occur, but the issue was joined when the automobile-industry code was being drawn.

The employers insisted that there be a merit provision in the code; this was opposed by organized labor as a discrimination device. The code administrator had already interpreted 7(a) publicly as not being a promotional weapon for trade unions and held that, while codes to be approved must contain satisfactory provisions regarding hours, rates of pay, and working conditions, the Section did not require collective bargaining while the codes were being formulated. The administrator yielded to the insistence of the automobile industry and permitted the "individual merit" clause to become a part of the code. This permitted the use of a device behind which the employer could bring pressure against union-inclined employees. There was an immediate scramble by other industries to include the clause in their codes, and there quickly appeared the problems of union recognition, trade union v. employee-representation plan, open- v. closed-shop, and the right of the employer to hire and discharge. The situation was so bad by July, 1933, that the President was advised by the

<sup>45</sup> "The N.R.A. was adopted June 16, 1933, and subsidiaries of the United States Steel Co. began influencing the installation of company-union plans on June 10, and the Republic Steel Co. was holding elections for representation on June 16. The Weirton election was on the 22nd of June. On June 27, *Iron Age*, the organ of the Steel Industry, declared plans were in effect in the above companies mentioned, including Jones & Laughlin Co., etc. . . .

"On August 17 the Chevrolet, Fisher Bodies, and other subsidiaries of General Motors announced that union plans were being announced in their plants.

"In October, at the time union labor had organized over 100 locals, the Chrysler Co. announced that union plans were being announced in their plants.

"In the cases coming before our Board all but two of the company unions were inaugurated after the introduction of the N.R.A.; all but one was inaugurated after the beginning of a labor-union organization. Two were set up during strikes, and one was set up as the result of free balloting between the company union and the outside union. In a few cases balloting was permitted for or against company unions."

Edwin Smith of the National Labor Relations Board (first) testifying before the Senate Committee on Education and Labor, S. Hearings on S. 1958 (Wagner Act), 74th Congress, 1st Session, Part II, pp. 165-166.

Labor and Industry Advisory Boards to create a tribunal to adjust the differences. This the President did on August 5, 1933, and thus began the National Labor Board.

Created informally, without even the benefit of an executive order, the National Labor Board was composed of three members representing employers, three members representing employees, and a chairman representing the public. President Roosevelt issued the following statement:

"Of importance to the Recovery Program is the appeal to management and labor for industrial peace. . . . With compelling logic, it calls upon every individual in both groups to avoid strikes, lockouts or any aggressive action during the recovery program . . .

"This joint appeal proposes the creation of a distinguished tribunal to pass promptly on any case of hardship or dispute that may arise from interpretation or application of the President's Reemployment Agreement . . ."<sup>46</sup>

The President announced the Board to be composed of Senator Wagner as chairman, William Green, Leo Wolman, J. L. Lewis, Walter Teagle, Gerard Swope, and Louis Kirstein. William Leiserson was made executive secretary. The function of the Board was to consider, adjust, and settle differences, not to enforce the protection of organized labor's rights except as that might be incidental.<sup>47</sup>

Almost at once the new Board was confronted with a major strike in the hosiery industry, which it succeeded in settling and thereby gave itself an auspicious start in the solution of industrial disputes. The settlement embodied the "Reading" formula, the parts of which were to reappear later in many other controversies

<sup>46</sup> *Public Papers and Addresses of Franklin D. Roosevelt*, Random House, Vol. II, p. 318.

<sup>47</sup> "Soon after the enactment of the [N.I.R.A.], it became apparent that some agency would have to be set up to handle the labor disputes which were constantly arising under the various codes and under the President's Reemployment Agreement.

"In order to meet that need, I appointed the first National Labor Board. . . . The function of the Board was to consider, adjust and settle differences and controversies that might arise through differing interpretations of the labor provisions of the codes, or the President's Reemployment Agreement."

*Ibid.*

and a formula the Board was to follow in interpreting Section 7(a). The formula provided: The strike was to be called off; the workers were to be reinstated without prejudice or discrimination; election by secret ballot was to be held to select representatives for collective bargaining on labor standards and conditions; employers and employees agreed that all disputes arising out of bargaining agreements were to be submitted to the National Labor Board for final decision.

This early success led the Board to establish twenty regional boards to handle local disputes and assume, thereby, jurisdiction formerly held by N.R.A. compliance boards, as well as to handle and expedite major disputes and establish policy. The legal establishment of the regional offices came, however, only after the President, under force of circumstances, attempted to give the Board more stature in the eyes of the public. The necessity for doing this arose out of the strong opposition against the Board by the Weirton Steel Company and the Budd Manufacturing Company. Both had company unions and refused elections, refused to recognize the AF of L affiliates, and successfully defied the Board. The Board was in an embarrassing position; and other employers were quick to follow the lead of these two companies in questioning the authority of the Board, which, indeed, was based entirely upon the Board's own action and the wish of its members. For, from the date of appointment the Board had been mediating all types of strike situations, whether arising out of the President's Reemployment Agreement or out of the codes, and within a short time was handing down decisions quasi-judicial in character, holding elections, certifying representatives, specifying the appropriate union, and attempting to remedy discrimination. The President on December 16, 1933, issued Executive Order No. 6511 continuing the National Labor Board and providing:

1. The Board was to continue to adjust industrial disputes and to compose all industrial disputes threatening the peace of the country.  
"All action heretofore taken by this Board in the discharge of its functions is hereby approved and ratified."
2. Its powers and functions were stated to be:
  - (a) To settle by mediation, conciliation, or arbitration all controversies between employers and employees which tended to impede the purposes of the N.I.R.A.

- (b) To establish local or regional boards upon which employers and employees were to be equally represented, with power and jurisdiction delegated to them by the Board.
- (c) To review the determinations of the local and regional boards where the public interest so required.
- (d) To make rules and regulations governing its procedure and the discharge of its functions.

While the order retroactively approved past Board action and definitely gave it mediation, conciliation, and arbitration power, there was still no precise authority for election procedure to determine representatives; and no enforcement power was given to the Board. But this order was a movement away from the *status quo* character that had been contemplated for the Board.

The strikes which had beset the recovery program continued despite efforts of the National Labor Board. Its primary function being the composition of all disputes after the issuance of Executive Order No. 6511, the Board still had no power to proceed on elections nor to enforce its determinations. The President therefore issued on February 1, 1934, Executive Order No. 6580, which added to the powers of the Board. In the new order:

(1) The Board was given broad discretion to conduct elections when requested by labor groups. The Board was to draw the rules and regulations and to have exclusive control of all elections held. The representatives selected by at least a majority of the employees voting were to be certified publicly by the Board as representatives of all employees eligible to participate.

(2) The Board was given power to report employer refusal to recognize or deal with properly determined representatives. Such report was to be made to the administrator of the N.R.A.

This latter section was amended by another Executive Order, No. 6612-A, February 23, 1934. It provided that an employer who was found by the Board to have interfered with an election or to have refused to bargain collectively should be so reported with recommendations for compliance to the Compliance Division of the N.R.A. or to the Attorney General. There was a proviso that "The Compliance Division shall not review the findings of the Board but it shall have power to take appropriate action based

thereon." The objective of this proviso was to prevent the division's retrying the case.

Here, under stress of the situations, were developing the majority-rule doctrine and the extension of the Board's power. And as the Board's power developed, the mediatory character was displaced by a quasi-judicial character, with the agency acting as a supreme court of industrial relations whose primary function was to determine and promulgate the labor policy desired. As such it became semi-independent, had fact-finding powers granted to it, could order and supervise elections, and could recommend enforcement procedure to the Compliance Division. This was indeed a pronounced shift away from the purely mediation, conciliation, and arbitration functions originally bestowed upon the Board but was made necessary because organized labor and employers would not accept each other under the intent of the law. The N.I.R.A. had visualized labor and employers working toward a common gain, and instead both sides "mobilized for war, not for friendly conferences to work out their common problem. . . . Before and during and after the war none of the combatants could read into section 7(a) a rule of reason. They sought in it only some means of gaining a strategic advantage in a fight."<sup>48</sup>

The executive order issued by the President on February 1, which specified the majority rule, was interpreted by Mr. Richberg and Mr. Johnson, administrators of the N.R.A., three days later. They conflicted with the Board and its formula, and everything the Board had so far accomplished in elections, by interpreting the executive order to mean that minority groups were to have representation.<sup>49</sup> This placed the Board in an embarrassing

<sup>48</sup> Donald Richberg, *The Rainbow*, Doubleday, Doran and Co., Inc., p. 139.

Further, Mr. Richberg has written, organized labor was itself split over the code-making provisions. Strong labor organizations were needed in order to carry out the agreements which might be made by employers complying with the codes. The breach between craft and industrial unionism exponents was immediately widened, and there was a real conflict in theory (of gains to be had from unionization) and practice (the reality of the craft unions hesitating to organize the unorganized).

<sup>49</sup> MR. LEWIS: "I was utterly astounded . . . in a meeting of the Labor Advisory Council [of N.R.A.] . . . by the confession of Mr. Donald Richberg. . . .

" . . . Mr. Richberg stated that he had prepared and written the executive order of the President which stated that right [majority rule] as a principle in labor relations.

" . . . Mr. Richberg confessed that three days after the executive order of the President had been written by him and promulgated by the White House, he had

position. At the same time, it was facing Weirton Steel Company in the courts, and strikes were not waning.

Meanwhile in Michigan a serious automobile strike was threatening. The obvious agency to settle the strike was the Board, and to have done so would have helped the prestige of the agency. Instead, the President, Richberg, and Johnson stepped in and averted what appeared to be a probable serious strike and one which would have affected the recovery program. The entrance of the President not only did harm to the prestige of the Board, which was none too great; but the settlement in part also violated the principles the Board was endeavoring to establish.<sup>50</sup>

written another interpretation which was made public . . . which emasculated the President's executive order, and interpreted section 7(a) . . . to mean that the right of minorities in groups of workers to bargain was to be protected to the point where the individual could also bargain with his employer."

MR. LEWIS: "[The interpretations] amounted to an encouragement of industry to refuse to abide by the decisions of the National Labor Relations Board. It encouraged industry to renew its efforts to prevent labor from being able to express itself in a majority sense. It encourages the formation of company unions and encourages the so-called 'proportionate' representation plan, and binds and misdirects labor, as witness the situation in the automobile industry."

S. Hearings on S. 1958, 74th Congress, 1st Session, Part II, pp. 191-192.

<sup>50</sup> The settlement included in part:

1. The employers agreed to bargain collectively with the freely chosen representatives of groups and not to discriminate in any way against any employee on the ground of labor-union affiliation.
2. If there were more than one group bargaining, each bargaining committee was to have total membership *pro rata* to the number of men each member represented.
3. The N.R.A. was to set up immediately a labor board to pass on all questions of discrimination, representation, and discharge.
4. The Government emphasized that it favored no particular union or form of employee representation or organization. "The Government's only duty is to secure absolute and uninfluenced freedom of choice without coercion, restraint, or intimidation from any source."
5. Increases or reductions of force should be subject to seniority, then individual skill and efficient service. After those considerations, in layoffs no greater proportion of outside-union employees should be laid off than other employees.

The President, commenting later in his book with regard to the strike situation and the settlement thereof, wrote:

" . . . It was the claim of the employers in this dispute that only a portion of the men in their plants desired to be represented by the particular organization which had threatened to call the strike. They desired definite recognition of the right to bargain collectively with those in their employ who did not regard themselves as represented by the union in question.

"In the effort to settle this dispute and to make adjustment of the varied and confusing points of view involved in this situation, where the union was admittedly

At the same time that he settled the controversy in the automobile industry, the President issued a statement interpreting the much-interpreted Section 7(a):

- "1. Reduced to plain language section 7a of N.I.R.A. means—
  - (a) Employees have the right to organize into a group or groups.
  - (b) When such group or groups are organized they can choose representatives by free choice; and such representatives must be received collectively, in order to straighten out disputes and improve conditions of employment.
  - (c) Discrimination against employees because of their labor affiliations, or for any other unfair or unjust reason, is barred."

"It has been offered by me to, and has been accepted by, the representatives of the employees and employers. It lives up to the principles of collective bargaining. . . . It gives promise of sound industrial relations . . ."<sup>51</sup>

Clearly the President's objective during this period was the resolution of industrial disputes, with protection of rights incidental. There was no general agreement on the principles which should rule the relations of organized labor groups and employers. The National Labor Board, originally with no guides, developed and sought to maintain principles and practices which it thought should dominate such relations. The clash of the majority-rule and proportional-representation principles was the epitome of the uncertainty and hesitancy regarding what ought to be the labor policy of the nation.<sup>52</sup>

young and not completely expressive, an agreement for proportional representation was used."

*Public Papers and Addresses of Franklin D. Roosevelt*, Random House, Vol. III, pp. 165-169.

<sup>51</sup> *Ibid.*

<sup>52</sup> ". . . From August 5, 1933, to July 9, 1934, when it was succeeded by the first National Labor Relations Board, the Board and its agents settled 1,019 strikes involving 644,200 employees, and was successful in averting strikes in 498 cases involving 481,600 employees. In addition, the Board was able to settle about 1,800 disputes in cases where there were no strikes or threats of strikes.

"This first National Labor Board, therefore, had a decidedly beneficial effect on labor relations and on recovery in general by saving money and preventing industrial strife and suffering through peaceful settlement of disputes. It was equally valuable in providing experience for later Federal legislation in connection with labor relations."

*Ibid.*, Vol. II, p. 525.

### F. Further Attempts to Legislate

Even while the strikes were occurring in February, 1934, Senator Wagner was working on a bill to put the National Labor Board on a permanent, statutory basis; and at the same time he included provisions dealing with such issues as recognition, collective bargaining, elections, etc. This bill, called the Wagner Labor Disputes Bill, was introduced in the Senate on February 28, 1934.<sup>53</sup>

The Wagner Labor Disputes Bill would have provided the protection which 7(a) was supposed to provide. But the bill also visualized the settlement of industrial disputes as an important function to be performed equally with the protection of labor's rights. To that end, conciliation and arbitration were provided.<sup>54</sup>

During the hearings on the Disputes Bill, Senator Wagner substituted another bill, and the Senate Committee rewrote S. 2926. Under the new bill, a "National Industrial Adjustment Board" of five members would have been created with power to prevent unfair labor practices.<sup>55</sup> The proscribed practices were considerably reduced from those outlined in the Wagner Labor Disputes Bill, and the Secretary of Labor was to start complaint machinery by

<sup>53</sup> S. 2926, 73rd Congress, 2nd Session.

<sup>54</sup> S. Hearings on S. 1958, 74th Congress, 1st Session, Part I, pp. 9 ff. The Wagner Labor Disputes Bill may be summarized:

The policy of Congress was to remove obstructions to the free flow of commerce, to encourage the establishment of uniform labor standards, and to provide for the general welfare, by removing the obstacles which prevented the organization of labor for the purpose of cooperative action in maintaining its standards of living, by encouraging the equalization of bargaining power of employers and employees, and by providing agencies for the peaceful settlement of disputes.

A "National Labor Board" was to be created, composed of seven members, two each from employers and employees and three from the public. The Board in its discretion could bring charges of unfair labor practices against an employer. After hearing and taking of testimony reduced to writing, the Board was to make a decision and issue an order which could "require such person to cease and desist from such unfair labor practices, or to take affirmative action, or to pay *damages*, or to reinstate employees, or to perform any other act that will achieve substantial justice under the circumstances." (Italics supplied.)

The Board was empowered to act as an arbitrator in labor disputes upon request by the parties, with power to issue awards enforceable in the courts unless otherwise stipulated by the parties. It was empowered to certify representatives and determine the unit for bargaining purposes.

The United States Conciliation Service was to be created and organized under a director within the Department of Labor.

<sup>55</sup> *Ibid.*

calling the attention of the Board to unfair practices. In order to obtain competency and standardized interpretation, the bill carried the innovation that enforcement and appeal were to be through the circuit courts rather than the district courts. Approximately the same arbitration provisions were made in both bills. The Board was to certify representatives and to determine the appropriate unit. Each unit was to be based on the majority rule; but proportional representation was to be followed in combining the different units, which is to say that proportional representation was the principle. This probably followed the Wagner Labor Disputes Bill which, while not clear on the issue, provided: "In any dispute as to who are the representatives of employees, the Board . . . may investigate such dispute and certify to the parties . . . the name or *names* of the individuals or labor organizations that have been designated."<sup>56</sup> The Industrial Adjustment Bill carried no provisions for the Conciliation Service, yet congressional emphasis was still on the settlement of disputes as well as protection of the right to organize.

The National Labor Board had been rendered obsolete by the settlement of the automobile industry's threatened strike and the principles there promulgated. The bills outlined constituted the trend, but it was difficult to obtain accord on principles. Moreover, it was felt that experience was needed to indicate just how a more inclusive law should be written. Congress was pressing for adjournment. That the administration was seeking legislation looking toward industrial peace is indicated by presidential statements at a press conference on May 25, 1934:

QUESTION: Mr. President, anything you care to say about the strike situation?

THE PRESIDENT: I don't think so. I think I had better not. . . . We are all working on it as you know.

QUESTION: You still need legislation of the type of the Wagner Bill dealing with this?

THE PRESIDENT: It would be very helpful . . . because it would clarify administrative procedure and at the same time would create methods that were perfectly clear under the law. In the individual strike cases people would know exactly the procedure on both sides—

<sup>56</sup> *Ibid.* Italics supplied.

whom they come under, and to whom they go, and what authority there is in any given case.

QUESTION: Is it fair to assume, then, that you want this legislation this session?

THE PRESIDENT: I would like to have it very much . . .<sup>57</sup>

On June 15, 1934, there was still no resolution of important issues, as was indicated at a presidential conference on that date:

QUESTION: Did you tell Senator Robinson, sir, that you wanted labor legislation this session before adjournment?

THE PRESIDENT: Yes, quite a while ago.

QUESTION: Have you agreed on a substitute form?

THE PRESIDENT: That you will have to find out up there on the Hill. . . . The real situation is this: We have been trying to get some form of legislation which would not greatly delay the termination of the session. There have been at least a dozen different drafts of legislation . . .

QUESTION: How do you feel on the point of minorities?

THE PRESIDENT: The question of minorities is not a tremendously serious one because that has to be worked out in each individual case. If there is a substantial minority, it seems fair and equitable that that minority should have some form of representation, but that is a matter of detail depending on the individual case. In some industries it is possible that neither side may want to have it.<sup>58</sup>

Apparently the principle of proportional representation was still uppermost in the mind of the administration in early 1934. It seems strange that the President regarded the issue as "not a tremendously serious one," in light of the majority-rule conflict that had raged ever since the institution of the N.R.A.

#### G. Joint Resolution No. 44

The desire for adjournment, plus the need for another year of experience won over the need for a law to replace the defunct, although existing, National Labor Board. Instead of an act, the

<sup>57</sup> *Public Papers and Addresses of Franklin D. Roosevelt*, Random House, Vol. III, p. 260.

<sup>58</sup> *Ibid.*, p. 300.

President on June 19, 1934, two days before the 1934 amendments to the Railway Labor Act were approved, gave his assent to Joint Resolution No. 44, which created the first National Labor Relations Board.<sup>59</sup>

The Provisions of Joint Resolution No. 44 were forerunners of the 1935 National Labor Relations Act, replaced the Wagner Labor Disputes Bill and the Industrial Adjustment Bill, and represented a compromise position. The resolution may be outlined:

The purpose was to "effectuate the policies of Title I of the National Industrial Recovery Act," and the President was authorized ". . . to establish a Board or Boards authorized and directed to investigate issues, facts, practices, or activities of employers or employees in any controversies arising under section 7(a) . . ." Any Board established was empowered to conduct a secret-ballot election of "any employees of any employer" to determine representatives to insure the right of collective bargaining under 7(a). The Board could order the production of documents or the appearance of witnesses at hearings in order to carry out the purposes of the resolution. Any order issued by the Board was to be enforceable or reviewable, as the case might be, in the same manner as an order of the Federal Trade Commission. Any board, with presidential approval, could prescribe rules and regulations to carry out its investigational powers and to assure the absence of coercion in all elections. A violation of such rules and regulations or any impediment or interference with any Board member or agent was punishable by a fine of \$1,000, or not more than a year in prison, or both.

The effective time limit of the resolution and of all boards established under it was June 16, 1935, or sooner if the President by proclamation, or the Congress by joint resolution, declared the emergency set forth in the N.I.R.A. at an end. The right to strike was not in any way abridged.

Essentially the Act gave the boards power to conduct elections and to conduct investigations of labor disputes. Orders could be issued only in election procedure with enforcement patterned after the F.T.C. Additional enforcement was dependent upon the Compliance Division of N.R.A. (Blue Eagle removal) or the

<sup>59</sup> 48 Stat. L. 1183. Union leaders in early 1934 had promised the workers in the steel industry a law to protect the right to organize.

Department of Justice. No unfair practices were listed as prohibited.

Here the Congress relied upon administrative procedure for what would be representation cases. But the scope of the Board to be created can be ascertained only by reviewing the provisions of Executive Order No. 6793 which created the Board.

### *1. The First National Labor Relations Board*

The Board was to recommend to the President other rules and regulations relating to collective bargaining, labor representation, and labor elections. If the parties to a dispute should so request, the Board was to act as a board of voluntary arbitration or to select a person or agency for voluntary arbitration. The Board was composed of three persons, was created "in connection with the Department of Labor," and by direction of the order assumed jurisdiction over the cases being investigated by the National Labor Board which was abolished by the order.<sup>60</sup>

The regional offices of the National Labor Board were abolished, except those which the new Board wished to retain. The Board was authorized and directed to report, after study, to the President through the Secretary of Labor whether special boards already, or to be, created should be given powers under Joint Resolution No. 44; to recommend the establishment of regional and special boards; and to review or hear appeals from such regional, industrial, and special boards as might be designated and established. Apparently, the basis was laid to constitute the Board as a supreme one over all other boards creatable under the resolution.

Another section of the order provided that the Board "may decline to take cognizance of any labor dispute where there is another means of settlement, provided for by agreement, industrial code, or law which has not been utilized." This provision seems permissive, but the President forbade the Board to intervene where codes provided boards with power of "final adjudication."

By another provision, the Board did have autonomous power

<sup>60</sup> The original appointees were Lloyd Garrison, chairman, Harry Millis, and Edwin S. Smith. Board members were to be impartial, presidential appointees, who were to devote full time to the work. The new Board retained most of the regional organization created by the National Labor Board. The personnel was transferred intact to the new Board.

over cases within its jurisdiction—no other executive agency could intervene and there was no executive review of the facts or orders. This provision, then, separated the Board from the Department of Labor and from investigation of cases by the Compliance Division of the N.R.A. The Department of Labor was to render its facilities available to the Board; and \$100,000 of the Board's funds were transferred, by the order, to the Department of Labor. Conciliation work was to remain within the Department of Labor; and there was a provision that the Board should hire no persons to do conciliation, mediation, or statistical work where such services could be obtained from the Department of Labor.

The Board centered in Washington and was composed of its members, an executive secretary, a legal division, examiners, research and statistical experts, and clerical help. Each regional office had a director, perhaps an associate director, and examiners. At least one panel, composed of representatives of labor, industry, and the public, was appointed by the Board in each region.

The functions performed were:

1. The settlement of disputes involving Section 7(a), and this meant mediation or conciliation by the regional director. Though the Board officially viewed itself as a court to adjudicate controversies arising out of Section 7(a) of the N.I.R.A., it was in fact often resolving controversies even where 7(a) had not been violated. Seldom were the arbitration provisions invoked.

2. The quasi-judicial interpretation of Section 7(a). Since each case first came before the panel in the regional office via the regional director, the Board itself acted as a superior court for the regional office. The director, approved by the panel, issued his findings and opinion, together with an enforcement clause, or a recommendation for adjusting the dispute if there was no violation of 7(a). Either party could request review before the N.L.R.B.; or if enforcement was the issue, the regional office would refer the case to Washington. After the Washington office held a hearing and reviewed the complete file of the case, the Board would hand down a decision reviewing the facts, stating the findings, and including an enforcement clause or a recommendation clause for settling the dispute. The Board thus continued to develop the principles begun under the National Labor Board, and this was visualized to be the principal function. The regional director in the

field, who dealt with the factual situation, was regarded as the person who should apply developed principles to particular cases.

3. The enforcement of collective bargaining requirements of Section 7(a). This was, as it had been with the National Labor Board, a difficult problem. The Board, in fact, admitted that it could not enforce its decisions, that they were no more than recommendations. For enforcement, the Board was to turn to the Compliance Division of N.R.A. or to the Department of Justice.

4. The conduct of elections. The Board at all times insisted and emphasized that the purpose of an election was to determine in a given bargaining unit what person, persons, or organization the employees wished to have represent them. Every precaution was taken to insure fair elections to attain the purpose.

At this stage, the administration's objective was governmental intervention in labor disputes and the prevention of disputes, although there was more emphasis on protection than there had been with the National Labor Board. Thus, there were conciliation and mediation through local boards or regional offices.<sup>61</sup> Major policy was to be determined by the central board, which, however, left details and implementation of policy to the regional offices. This point is important for contrast with the Board which was to follow under the Wagner Act, where no discretion was left to the regional offices but rather all procedure was to be completely centralized. Congress did not lay down the details of a national labor policy but left to the President the task of making such arrangements as might seem necessary, while the President,

<sup>61</sup> "For many weeks, but particularly during the last ten days, officials of the Department of Labor, the National Recovery Administration and the National Labor Board have been in conference with me and with each other on this subject. It has been our common objective to find an agency or agencies suitable for the disposition of these difficult problems, and after making such selection to make clear to the public how this machinery works and how it can be utilized in the interest of maintaining orderly industrial relations and justice as between employers, employees and the general public, and enforcing the statutes and other provisions that relate to collective bargaining and similar labor relations.

"The very presence of this board and any boards it may authorize will undoubtedly have a salutary effect in making it possible for individual conciliators to arrive at settlements of local grievances promptly. Indeed it is my hope that so far as possible adjustment in labor relations and the correction of labor abuses can be effectively made at the source of the dispute. . . ."

*Public Papers and Addresses of Franklin D. Roosevelt*, Random House, Vol. III, p. 825.

those on the labor boards, and the Department of Labor were seeking the proper national labor policy. There was no meeting of minds as to just what legislation should be written, and it was hoped that another year of experience would point the way. The Federal Government was not here promoting labor organization, nor even collective bargaining primarily, but was first concerned with the maintenance of industrial peace. Public Resolution No. 44 was a stopgap following the demise of the National Labor Board, which had arisen from the ambiguity of Section 7(a), confusion in interpretations made by different persons in the Recovery program including the President, and the attitude of organized labor and employers.

The National Labor Relations Board enjoyed no more success than its predecessor, although success was not lacking.<sup>62</sup> But what the Board did not have was superiority in the determination of a national labor policy nor the power to enforce its own decisions; and these deficiencies meant that no matter how reasonable the approach of the Board on important issues, it could not itself establish the principles it wished to promulgate. While the National Labor Board and the first National Labor Relations Board were in existence other boards were set up in certain industries, either under the joint resolution or under the codes. The National Bituminous Coal Labor Board with six divisions was created and the Newspaper Industrial Board was established under codes. By administrative orders under code authorities, labor boards were also set up to settle disputes in the textile industries and in the shipbuilding and ship-repair industry. A Petroleum Labor Policy Board was set up by the Secretary of the

<sup>62</sup> "During the period from July 9, 1934, to May 30, 1935, the Board settled 703 strikes involving 229,640 employees, and it succeeded in averting threatened strikes in 605 cases involving 536,398 employees. In addition, it settled about 14 disputes in cases where there were no strikes or threats of strikes. Elections under its supervision were conducted in 579 establishments covering 56,814 employees. . . . As a result of these elections, the employers recognized the elected representatives in 306 cases, and in 278 cases harmonious relations resulted. Compliance was secured in 46 of the 158 cases in which the Board directed compliance in formal decisions.

" . . . The Board was continuing the National Labor Board's endeavor to build up a body of labor law. . . . It added substantially to the contribution of the National Labor Board in this field and left a very creditable record of accomplishment."

Interior. Under the joint resolution the National Longshoremen's Board was created with jurisdiction limited to the Pacific Coast. The iron and steel industry functioned under the National Steel Labor Relations Board. The creation of other boards meant jurisdictional problems and uncertainty, and this did not help the prestige of the Board. The President himself, on January 31, 1935, issued an executive order incorporating the automobile labor board into that industry code and thereby removed the industry from the jurisdiction of the National Labor Relations Board.

Other difficulties beset the Board because it attempted to carry cases through the courts, and for this it depended upon the regional offices to compile the record in the case as well as to endeavor to mediate and adjust disputes. The result was a considerable lack of dispatch in pushing cases through the machinery to completion. The procedure of the regional offices was always informal and ill-defined, and it was almost impossible to know when the regional office was mediating or finding facts. The regional offices followed no regularity on notice of hearings, the competency of witnesses, or the relevancy of testimony; and they had no power to order the appearance of witnesses or the production of documents. At the same time, court difficulties were encountered. For example, in February, 1935, the carry-over Weirton Steel Company case was decided by the Delaware District Court, which held Section 7(a) to be unconstitutional and that in any event the Weirton Company was not guilty of coercion.<sup>63</sup> Adverse court decisions detracted from prestige and engendered employer opposition.

The only weapon with which to overcome employer resistance was the Board's reliance upon the Compliance Division of the N.R.A., or the Department of Justice. The Compliance Division could remove the Blue Eagle, but such action did not particularly affect employers and was not important to consumers. In a few cases, employers even obtained injunctions against the removal of the Blue Eagle for such reasons. The Department of Justice hesitated to move for the Board, and the result was that any ideal the Board may have had for constituting a supreme court of industrial relations was swept away by lack of the prerequisite any supreme

<sup>63</sup> *New York Times*, Feb. 28, 1935, p. 1.

court must have—the ability to apply sanctions to enforce its decisions. The enforcement record for the Board's most active period, from July 9, 1934, when it was created, to March 2, 1935, was as follows: The Board issued findings and decisions in 111 cases. A violation was found in 86. The employer made restitution in 34 cases. Of the 52 remaining cases, 33 were referred to the Department of Justice. On March 13, 1935, the Department of Justice had made the following disposition: A bill of equity was filed in the district court in one case; seven cases were referred to the United States attorney who, together with the Board, was to get additional evidence (but no suit was brought); in nine cases the Department of Justice advised the Board that further investigation was necessary before the cases could be referred to the local United States attorney; in three cases the Department advised no suit was justified in law; in thirteen cases the Department did not proceed for various reasons.<sup>64</sup>

Yet the Board did attempt to develop principles. The absence of enforcement powers amounted only to an assertion of an ideal rather than the active promulgation of a national labor policy, and the effectiveness of the ideal was dependent upon its acceptance by the employers and labor organizations. Experience and knowledge desired by the President were accumulated and were to be the basis for additional legislation, but at the same time the Board was stressing enforcement more and conciliation less. When Donald Richberg became N.R.A. administrator on March 22, 1935, ". . . the Labor Board had elevated itself into an independence wherein neither the language of the law of its creation nor the expressed view of its creator could swerve it from a course of dispensing justice according to its own judgment of what was right."<sup>65</sup> And further, "But its [N.R.A.] worst errors were in trying to overcome friction with force instead of with the oil of persuasion. Nowhere did the industrial recovery program demonstrate this error more profoundly than in efforts to write and enforce laws to govern labor relations."<sup>66</sup>

<sup>64</sup> Testimony of Chairman Biddle of the first N.L.R.B. before the Senate Committee on Education and Labor, S. Hearings on S. 1958, 74th Congress, 1st Session, Part I, p. 93.

<sup>65</sup> Donald Richberg, *The Rainbow*, Doubleday, Doran and Co., Inc., p. 156.

<sup>66</sup> *Ibid.*, p. 158.

## H. The Accomplishments of the Labor Boards

The National Labor Board and the first National Labor Relations Board had a broad grant of policy to interpret; and against generations of certain practices the boards endeavored overnight to institute, by government fiat, what the board members thought to be a desirable public policy in the field of labor relations. Whether the principles were desirable does not seem of major importance; the principles represented a profound change from past methods and principles, and difficulties could be expected when the principles had to be dealt with by those who mattered most, namely, employers and employees. The boards, it may be said, had to deal with severely practical problems under great pressure from opposing parties; and the boards' solutions, while reached perhaps too quickly and without proper consideration for the complexities involved, came too slowly rather than too rapidly under the circumstances. And the principles enunciated seem to have been not the statement of national policy based on the studied consideration and judgment of those who enact legislation with a sense of responsibility to an electorate. Rather, the principles were an instance of the formulation of far-reaching legislative policy by an executive agency under the pressure of circumstances, which were later to be legalized and given general application by legislation.<sup>67</sup>

Old-line labor leaders also found that the pace of events, and the promulgation of principles, came too rapidly for adjustment. The breadth of Section 7(a), which the National Labor Board

<sup>67</sup> Lorwin and Wubnig in their book, *Labor Relations Boards*, the Brookings Institution, p. 94, wrote: "In sum, the N.L.B. soon transcended all of the limitations inherent in the statement of August 5, 1933. It did so on its own initiative although by the force of events rather than by conscious choice."

Willard Matthias, in an unpublished paper, *Political Processes in the Constitutional State: An Analysis of Public Policy*, uses this, together with other "pressure" evidence, to support his thesis that it is the pressure of certain individuals and the groups for whom they speak, rather than a responsibility for the public safety, that explains the derivation of public policy.

In the case of the boards, it was a matter of strong-minded men, with ideas as to where organized labor belonged in the society, who were responsible for the principles enunciated. Certainly the President and the Congress had no crystallized conclusions as to principles and policy; and it was the principles agreed upon by the members of the two boards which were dominant, although the President's views could not always be reconciled. Yet, presidential support followed the determinations made by the boards.

and first National Labor Relations Board always confronted, meant interpretation and new "rules of the game" that, no matter how sound, would always in effect be the imposition of a labor policy rather than the development of a labor policy after the removal of barriers. National labor policy and labor relations develop over decades, not over months. And even if one were to agree that all the principles enunciated by the boards were sound and equitable and desirable, still there would need to be the recognition that a long period of time and a painful period of readjustment would be necessary. Moreover, there is always the consideration that an unsound labor policy will result if the "rules of the game" are "made," instead of permitted to develop out of their own milieu.

Since the executive order authorized and directed the first National Labor Relations Board to study special boards and make recommendations regarding them to the President, the Board made a study "and concluded that separate boards for the various industries were not desirable. They reported that it was preferable to have one impartial national board to determine, *in the last instance* and subject only to court review, *all labor questions*; and that *sub-agencies* should handle the cases in the first instance in the various regions and localities. The results of this study helped to frame the legislation which was then being prepared to supersede, and which did supersede, Public Resolution No. 44."<sup>68</sup>

The doctrines evolved by the National Labor Board and the first National Labor Relations Board have been referred to by some writers as a kind of "common law" of labor relations.<sup>69</sup> It does not seem accurate so to dignify them, since "common law" implies an acceptance of precedent and tradition by those who, in acting, are liable for consequences flowing from action deemed contrary, by authority, to standing principles of operation. The nebulous character of the boards, the failure to enforce their decisions, the continual debate in industry and labor generally as to the merits of certain principles, and disagreement among different "authorities" as to what principles were to be followed deny any

<sup>68</sup> *Public Papers and Addresses of Franklin D. Roosevelt*, Random House, Vol. III, p. 311. The italics are supplied in order to emphasize what was contemplated by the Board's report.

<sup>69</sup> Lorwin and Wubnig, in their *Labor Relations Boards*, the Brookings Institution, Chap. XVI, do so.

development of "common law." The boards only specified those practices that they believed held promise for a reasonable approach to the labor relations problems arising out of the industrial milieu of the 1930's. These doctrines were as follows:<sup>70</sup>

1. It was unlawful for an employer to impose on his employees any scheme of collective bargaining against their will.

2. Workers were free to choose between representation by independent trade unions or company unions (if the latter were not dominated by the employer).

3. The governmental agency would settle representation controversies by elections or other appropriate means. Three criteria were used to determine whether an election should be held: (a) Do a substantial number of workers desire an election? (b) Is an election in the public interest? (c) What workers are eligible to vote?

4. The governmental agency would determine the appropriate bargaining unit in event of question. There was really a compromise on this issue, a compromise that was to be used later by the present Board under the name "Globe doctrine." The early boards said that "the representatives of a given craft are entitled to recognition for purposes of collective bargaining, regardless of what other production employees in the plant desire, if it appears, first, that the craft in question has traditionally bargained collectively for members of its group; or, second, that the group or craft has problems which are more or less peculiar to itself and which require special representation in collective bargaining."<sup>71</sup>

5. Given the appropriate unit, majority rule was to determine who should be certified as representatives of the employees. This doctrine had a stormy career. The union movement in the United States demands majority rule because unions, facing the opposition of only a lukewarm attitude toward unionism by employees generally, fear minority groups; employers fear majority groups because the closed-shop appears more likely. The President and the administrators of the N.R.A. were never conclusive on the efficacy of the majority-rule doctrine which the boards evolved, first in the *Denver Tramway* case on March 1, 1934, and more definitely in the *Houde* case on August 30,

<sup>70</sup> Drawn and condensed from Lorwin and Wubnig, *Labor Relations Boards*, the Brookings Institution, Chap. XVI, and W. H. Spencer, *Collective Bargaining under Section 7(a) of the National Industrial Recovery Act*, The Journal of Business of the University of Chicago, The Univ. of Chicago Press, Vol. VIII, No. 2, Part 2, pp. 19-84, April, 1935.

<sup>71</sup> W. H. Spencer, *op. cit.*, p. 59.

1934.<sup>72</sup> The Congress never settled the majority-rule question in its own mind. The 1934 amendments to the Railway Labor Act were being legislated while Joint Resolution No. 44 was being debated, yet the former carried the majority-rule principle and the latter did not. The boards' position was that logic and expediency demanded the principle since the end of collective bargaining was to reach an agreement for a fixed period of time. The "duty" of the employer toward collective bargaining began to be emphasized.

6. The employer was obliged to negotiate in good faith with representatives of employees. This meant that the employer had to receive the representatives, who had to present their demands at a reasonable time to the employer or someone who had power to act for him. The employer could not refuse to meet representatives because the demands were excessive or unreasonable. Workers were not deprived of their statutory rights under Section 7(a) when the employer bound them by a vote taken under employer domination.

7. There was a duty on the part of the employer to bargain in a positive fashion and in good faith. The subject matter of bargaining was not only individual grievances and differences, but also wages, hours, and working conditions. Employees had to negotiate and continue to negotiate before calling a strike where the employer was bargaining in good faith—that is, the boards not only ruled against employers but also acted as disciplinary instruments against labor organizations which might yield to a desire to test their economic strength. The first National Labor Relations Board, which regarded the agreement for a fixed period as the essence of collective bargaining, viewed the agreements reached as mutually binding and not termin-

<sup>72</sup> Donald Richberg, in *The Rainbow*, Doubleday, Doran and Co., Inc., pp. 153-154, regards the *Houde* decision as greatly expanding Section 7(a), although he agrees that it was a thoughtful decision. Even, argues Mr. Richberg, if one grants the logic of majority rule, still it was not stated in the statute, it violated the express grant to employees to organize and bargain free of employer restraint, and it imposed a restraint on constitutional "liberty of contract." More important, one paragraph of the *Houde* decision stressed that the Board laid down no rule as to what should constitute the proper basis for representation, and this brought the unit problem.

The Board, writes Mr. Richberg, following the *Houde* decision expanded Section 7(a) into a code of good behavior. "The Board did not reach the point of empowering itself to decide what should be written in a contract, but it went a long way in writing rules on which to base a legal conclusion that the law was being violated unless a contract was made in the form and with the persons approved by the Board." ". . . Labor relations would have been much improved . . . if the Labor Relations boards had undertaken to use their powers to conciliate and bring together warring elements, instead of using them often so effectively to drive the contestants further apart."

able at the will of either party. There was no rule promulgated that any agreement reached had to be reduced to writing; but, recognizing the difficulty of enforcing any oral agreement in industrial relations, employers who refused to reduce the agreement to writing were strongly condemned. The written agreement was urged, and the failure by an employer to reduce the agreement to writing might be used as evidence of a denial of the right of collective bargaining.

8. There was to be no employer discrimination against employees for union membership or activities. The first remedy tried for such practice was voluntary reinstatement, and if that failed the agency recommended reinstatement immediately, or within a stated period. In strike situations the recommendation was for the reinstatement of all striking employees in the order of their seniority as the business justified, even if the employer had to dismiss workers who had been meanwhile employed. As a rule, reinstatement was not sought for workers guilty of violence or other misconduct during a strike. Usually back pay was awarded only from the date the regional office ordered reinstatement, not from the date the discriminatory action occurred. Deductions were made for any earnings of the employee in the interim.

### I. Recapitulation of Legislative Background

These principles were mostly the result of the bottle-neck that was created in the years 1933-1935, when there were channeled into one pressure stream all the tendencies of almost a century of debate and experience in the field of industrial relations. Stemming from *Commonwealth v. Hunt*, evidence was ample that there was a demand that the right of labor to organize should be protected. Official investigating bodies had looked hopefully upon this recourse, and their findings were strikingly similar. Court decisions throughout the whole period had wavered between protection and nonprotection of the right of labor to organize. The most important litigation for the legislation of the middle 1930's was the *T.&N.O.* case, where there was a clear verification of the right to organize; and it was this case which gave direction to the formulation of public policy. The railroad legislation and the development of carrier-employee relationships from a stage of bloodshed and strife to one of respectable dealing around the conference table extended over decades and culminated in 1934 with the amendments to the Railway Labor Act.

of 1926. The amendments first took form in the Bankruptcy Act amendments and were then incorporated in the Emergency Railroad Transportation Act, and thus these amendments were to have their effect in shaping policy for industrial relations generally. The Norris-La Guardia Act of 1932, negative in approach but significant as a statement of policy, was an important legislative aid when the Congress was faced with stating positively the national policy. Experience had been gained during the Great War, when the exigency demanded production and amicable relations in order to procure that production. There were developments which added to the problems for the future, such as the growth of shop-committees, but the developments also indicated the tack which might be taken in industrial relations. The unfortunate Section 7(a) from which the Wagner Act was most immediately to stem, conceived in ambiguity, with no sense of direction and a mass of confusion, gave rise to all manner of interpretation, non-compliance, unenforcement, opposition, and vituperation. Yet the very ambiguity of the section gave impetus to the growth of the institution the section was meant to destroy—the company union. Legislative attempts to rectify the weaknesses of Section 7(a) failed under demands for adjournment; and Joint Resolution No. 44 was but a temporary makeshift that was deficient in empowering the Board created thereunder to accomplish its purposes, which, indeed, were not crystallized. Throughout the period 1933-1935 there was no common ground where conflicting groups' demands could be reconciled.

#### J. The Wagner Bill

Senator Wagner, in February, 1935, anxious to maintain the gains made, and with general if indefinite permission of the administration, introduced into the Senate the bill that was to become the Wagner Act—S. 1958.<sup>73</sup> This bill, which had the benefit of conferences between the AF of L and Senator Wagner, as well as the political insistence of the AF of L, was a new draft, since an additional year of experience had been had since his Labor Disputes Bill. Too, the bill had the benefit, advice, and experience

<sup>73</sup> The same bill was introduced in the House by Representative Connery as H. R. 6288.

of the members and staff of the first National Labor Relations Board.

### 1. *The Emphasis on Protection of Rights*

The new bill represented the last stage of the two-year trend from governmental intervention in disputes to an outright protective and promotional function. Whereas the National Labor Board dealt in mediation, conciliation, and arbitration and regarded its function as two-sided, and whereas the first National Labor Relations Board departed somewhat from the functions followed by the National Labor Board but still engaged in some arbitration and mediation, the new Wagner bill would remove completely the functions of mediation, conciliation, and arbitration. The proposed Board would have power that prior boards did not have, and power which had been needed. The experience of the first National Labor Relations Board had indicated, according to Board member Lloyd Garrison, the need for legislation which would prevent certain practices: (1) The discharge of employees for union activity; (2) The company-dominated union; (3) The refusal of companies to deal with, or recognize, the unions or their representatives; (4) The dissemination of anti-union propaganda through powerful employers' associations, the use of espionage systems, and the combating of union organization.<sup>74</sup> The need for mediation had not lessened, and mediation had been quite successful in many of the regions. But it was decided that of more importance was the proscription of employer practices, which, to Senator Wagner and the members of the first National Labor Relations Board, appeared to run counter to the objectives sought. Most important in the minds of the proponents was the desire to make impossible the use of economic coercion by employers in order to prevent unionization of the employees.<sup>75</sup>

<sup>74</sup> *Verbatim Record of the Proceedings of the House Committee Investigating Labor Board and Wagner Act*, Bureau of National Affairs, Washington, 1939-1940, Vol. II, No. 13, pp. 494 ff. This source will hereafter be designated simply as Smith Hearings, Vol. . . . , No. . . . , p. . . . Such abbreviation is through the courtesy of the Bureau of National Affairs.

<sup>75</sup> Said Senator Wagner during the hearings on S. 1958: "This measure deals with the subtler forms of economic pressure. Such pressure can not be exerted by employees upon one another to an extent justifying congressional action. But it can be directed against a worker by an employer who controls his job. It is this latter evil which has grown to a magnitude requiring a new public remedy." S. Hearings on S. 1958, 74th Congress, 1st Session, Part I, p. 47.

Economic coercion was not the only "evil" to be eradicated; but the bill was also aimed at employee-representation plans, which meant company domination of the employees' desires and activities relating to unionism. That the new objectives were based on experience may be indicated by the fact that about eighty per cent of the cases handled by the first National Labor Relations Board involved charges of discrimination because of union activity, while some thirty to thirty-five per cent involved cases dealing with company unionism.<sup>76</sup>

From the testimony before the congressional committees it is clear that the proponents of the bill visualized the proposed Board as an independent agency enforcing preventive legislation. The real issues were the prohibition of unfair labor practices with which the administrators of the N.I.R.A. had been unable to cope, the outlawing of the company-dominated union, and the protection of the *right of the individual* to organize. There was no evidenced desire to promote union organization nor even, indeed, to promote collective bargaining nearly as much as there was the desire to provide protection, to remove barriers, so that the individual could do as he wished in matters of unionism. The serious problem of majority rule and its relationship with the difficult unit issue were recognized by men experienced in industrial disputes. But despite the recognition that the Board might render unfair decisions, it was determined to proceed with the legislation.<sup>77</sup> This appeared to be the least risky method of

<sup>76</sup> So testified Chairman Biddle of the first N.L.R.B. *Ibid.*, p. 82.

<sup>77</sup> The following colloquy is illuminating:

CHAIRMAN BIDDLE: ". . . The big fight is over representation. . . .

"The major problem connected with majority rule is not the rule itself, but its application. The important question is to what unit the majority rule applies . . . [The unit] may be a craft, plant, or employer unit . . . To lodge the power of determining this question with the employer would invite unlimited abuse and gerrymandering the units would defeat the aims of the statute. If the employees themselves could make the decision without proper consideration of the elements which should constitute the appropriate units they could . . . defeat the practical significance of the majority rule; and, by breaking off into small groups, could make it impossible for the employer to run his plant."

SENATOR LAFOLLETTE: "The Board could do that, too."

CHAIRMAN BIDDLE: "You are entirely right, Senator LaFollette, and, of course, you have to take a chance to an extent on your Board. We have three choices, and the employer is not the person to determine the unit. If your employees determine it, any group can break off from the main bargaining union and constitute itself a little bargaining unit."

"Now, it is true you run the risk, as you do in all governmental boards, of your

solving the problem of industrial strife arising out of anti-union sentiment and all it entailed on the part of employers. The opponents of the bill were frightened by the prospective power of the AF of L, were concerned about the closed-shop, refused to accept the majority-rule doctrine, declared the act would be held unconstitutional, and showed in some quarters a surprising lack of information as to what the bill actually provided.

## 2. *The Passage of the Wagner Bill*

The Senate committee rendered its report on the bill on May 2, and the Senate passed the bill on May 16, 1935.<sup>78</sup> The House report was due June 10; and in the interim was handed down the Supreme Court decision in the *Schechter* case,<sup>79</sup> which invalidated the existing Labor Board through the destruction of the N.I.R.A. The whole recovery program was thrown into turmoil. Among organized labor there was an immediate demand that, more than ever, the legislation must go through.

Apparently the administration was, until the *Schechter* decision, never certain as to the direction the labor legislation should take. The President, on February 11, in a greeting to the AF of L, had indicated his belief in the protection of the right to organize; and even more, he indicated his belief in the promotion of collective bargaining, conciliation, and arbitration:

" . . . I have on a number of occasions urged the necessity, as well as the soundness, of furthering the principle of collective bargaining as between labor and management. This is my personal point of view, but it is also set forth in the National Industrial Recovery Act.

" . . . It must be obvious that the best possible results in rehabilitating our economic structure are to be found in the well-organized and highly developed organization of both employees and employers, with their relationship resting upon the foundation of conciliation and arbitration and the full and frank recognition of the inescapable community of interests to be found in the industry itself.

Board gerrymandering and not carrying out the purposes of the Board. I think that is a risk you must run in all democratic governments."

S. Hearings on S. 1958, 74th Congress, 1st Session, Part I, pp. 82-83.

<sup>78</sup> By a vote of 63-12. Congressional Record, 74th Congress, 1st Session, p. 7681.

<sup>79</sup> *Schechter Poultry Corp. et al v. United States*, 295 U. S. 495 (1935).

"The Federal Government has indicated through the National Industrial Recovery Act its desire that labor and management organize for the purposes of collective bargaining and the furtherance of industrial peace and prosperity, but the Federal Government cannot, of course, undertake to compel employees and employers to organize. It should be a voluntary organization."<sup>80</sup>

The AF of L may have helped the President to make up his mind. William Green, in a speech on May 23, 1935, at Madison Square Garden, told a mass meeting of labor leaders that labor would organize all its economic strength to force Congress to adopt what it called its Bill of Rights and its Magna Charta. Mr. Green called for political retaliation against those congressmen who did not support the Wagner Bill.<sup>81</sup>

On May 24, Mr. Green, John L. Lewis, Sidney Hillman, Secretary Perkins, Donald Richberg, Judge Stephens of the Department of Justice, and Senator Wagner conferred with the President and discussed the administrative features of the pending bill. For the first time, the press and the labor leaders, following the conference, said that Mr. Roosevelt favored the legislation and agreed to put the pending bill on his "must" legislation list. The President had been won over.<sup>82</sup>

Mr. Raymond Moley has written with regard to the Wagner Act:

"Senator Wagner's Labor-Relations bill, which the President had no intention of supporting in January, developed unforeseen strength in Congress. As spring came on, the President faced the necessity of deciding whether he would accept it. By early June, partly because he needed the influence and votes of Wagner on so many pieces of legislation and partly because of the invalidation of the N.I.R.A., he flung his arms wide open and suddenly embraced the Wagner bill—whose palpable one-sidedness could have been eliminated then and there."<sup>83</sup>

The House was not difficult to convince in light of the immediate consequences of lower pay and longer hours that followed the

<sup>80</sup> *Public Papers and Addresses of Franklin D. Roosevelt*, Random House, Vol. IV, pp. 78-79.

<sup>81</sup> *New York Times*, May 24, 1935, p. 1.

<sup>82</sup> *New York Times*, May 25, 1935, p. 1.

<sup>83</sup> Raymond Moley, *After Seven Years*, Harper and Bros.. p. 304.

overthrow of the N.I.R.A. three days later. Representative Connelly asked the House on June 19 to pass the bill as it was reported with committee amendments, and he said in the House that the bill then was in the form the President desired. The House passed the bill without a record vote.<sup>84</sup>

For practical purposes there was no labor board of any kind following the *Schechter* decision on May 27, 1935. The Board continued to exist, however, since its life was to run until June 16, 1935, under Resolution No. 44; but the powers of adjudicating Section 7(a) disputes disappeared, and all cases pending in the courts by the Board were dropped. On June 15, 1935, the President by executive order extended the life of the Board until July 1, 1935, and later extended its existence to September 1, 1935.<sup>85</sup>

The Wagner Act as passed was very similar to the bill as introduced. The House insisted upon an amendment that would broaden the jurisdictional basis for the legislation and shift the emphasis from the maintenance of purchasing power to the prevention of strikes. The Senate agreed to the change. The definition of commerce was somewhat narrowed ("communication" was dropped). The Senate bill would have had the Board an "independent agency in the executive branch of the Government"; but the House insisted that the phrase be struck, since the Board was to be comparable to the Federal Trade Commission and was to be quasi-judicial and quasi-legislative. The House desired an amendment in light of *Rathbun v. United States*,<sup>86</sup> handed down May 27, 1935, so that there would be no unlimited removal power by the President implied on the basis of the power to appoint Board members. A slight change, which would later become important, was made in the section relating to the appropriate-unit problem and the power of the Board thereunder. To assure "abundant caution," the House amendment inserting "due notice" with regard to Board hearings was adopted, although the conference committee believed that to be implied in the bill. The House amended the bill to provide that nothing in the Act should

<sup>84</sup> Congressional Record, 74th Congress, 1st Session, p. 7681.

<sup>85</sup> Executive Order No. 7074 reestablished the N.L.R.B. and fixed its functions under Senate Resolution No. 113, which extended a skeleton N.R.A. The life of the Board was further extended by Executive Orders Nos. 7089 and 7121 to September 1, 1935, when the new N.L.R.B. under the Wagner Act would begin operations.

<sup>86</sup> 295 U. S. 602 (1935).

abridge the freedom of speech, or of the press, but this was dropped in conference on the grounds that such an amendment could have no legal effect; it would only restate the first amendment to the Constitution, which was above congressional declarations. Several other amendments which improved construction were agreed upon in conference. The fifth unfair labor practice was added; the arbitration provisions were dropped because Senator Wagner concluded that proscriptions and the duties of arbitration and mediation should not be the function of the same body.<sup>87</sup>

Both bodies of the Congress approved the Wagner Bill on June 27, 1935; and President Roosevelt signed the Act on July 5, 1935.<sup>88</sup> The signature of the President was the signal for an agency of the Federal Government to function protectively, and that agency was to possess sufficient powers of enforcement.

<sup>87</sup> H. Report No. 1147 (on S. 1958), S. Report No. 573, Conference Report No. 1871, 74th Congress, 1st Session.

<sup>88</sup> 49 Stat. L. (I) 449. Upon signing the Act the President said:

"This Act defines, as a part of our substantive law, the right of self-organization of employees in industry for the purpose of collective bargaining, and provides methods by which the Government can safeguard that legal right. It establishes a National Labor Relations Board to hear and determine cases in which it is charged that this legal right is abridged or denied, and to hold fair elections to ascertain who are the chosen representatives of employees.

"A better relationship between labor and management is the high purpose of this Act. By assuring the employees the right of collective bargaining it fosters the development of the employment contract on a sound and equitable basis. By providing an orderly procedure for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. By preventing practices which tend to destroy the independence of labor, it seeks, for every worker within its scope, that freedom of choice and action which is justly his.

"The National Labor Relations Board will be an independent quasi-judicial body. It should be clearly understood that it will not act as mediator or conciliator in labor disputes. The function of mediation remains, under this Act, the duty of the Secretary of Labor and of the Conciliation Service of the Department of Labor. It is important that the judicial function and the mediation function should not be confused. Compromise, the essence of mediation, has no place in the interpretation and enforcement of the law."

*Public Papers and Addresses of Franklin D. Roosevelt*, Random House, Vol. IV, pp. 294-295.

## Chapter II. THE LEGISLATIVE POLICY

The newly enacted public policy<sup>1</sup> was to encourage collective bargaining and protect the right of the workers to organize and designate representatives. To implement the policy, an independent Board of three members was to be created, and the activities and employees of the first National Labor Relations Board were to be transferred to the new Board.

The right of the worker to self-organization and collective bargaining was specifically affirmed; and such affirmation was similar to Section 7(a) of N.I.R.A., the Railway Labor Act as amended in 1934, the statement of policy in the Norris-La Guardia Act, sections of the Bankruptcy Act amendments of 1933, and sections of the Emergency Railroad Transportation Act. The affirmation is fortified by five proscriptions against certain forms of employer activity. The employer may not (1) interfere, restrain, or coerce the employees in the exercise of their rights; (2) dominate or interfere with the formation or administration of any labor organization, including financial support; (3) discriminate in regard to hire, tenure, or conditions of employment in order to encourage or discourage membership in any labor organization, provided, however, that an employer may enter into a closed-shop agreement providing a majority of the employees have designated the representative; (4) discriminate against an employee for filing charges or giving testimony under the act; (5) refuse to bargain collectively with representatives of the employees.

The principle of majority rule is followed for the selection of representatives, and the Board has the responsibility and dis-

<sup>1</sup> For the entire Act see Appendix I.

tion to determine the appropriate unit. The Board, in event of controversy, is to investigate and certify the proper representatives, after an election or other "suitable method." Since an investigation by the Board to ascertain proper representatives is a factual determination, the facts must be filed with the court where the certification of the representatives is the basis, in whole or in part, for a Board order.

Whenever the proscribed unfair practices would affect commerce, the Board is empowered to prevent such practices if a charge is brought. The procedure necessary under the Act provides for a complaint, hearing, and answer; and rules of evidence prevailing in courts of law or equity are not controlling. The testimony is to be reduced to writing, arguments before the Board may be held, and the Board issues its findings of fact. With its findings of fact, the Board either orders the dismissal of the case or orders the person complained of to cease and desist. The Board may also order reinstatement with back pay, or such other action as will effectuate the policies of the Act.

The Board's orders are not self-enforcing; and recourse is to the circuit courts of appeal, both for the agency and the person aggrieved by a Board order. Before the courts, the Board's findings of fact, if supported by evidence, are conclusive. Appeal is to the Supreme Court.

The Board is given investigatory powers, but the exercise of such powers is limited to the prevention of unfair labor practices and representation proceedings.

No penalties are provided for violations of the Act, although one section does provide a fine, or imprisonment, or both, for willful interference with the Board members or agents in the performance of duty.

There is a provision that nothing in the Act shall be construed as a limitation of the right to strike.

There are no provisions in the Act relating to compulsory arbitration, wage-fixing, or collective agreements which might be made. This Act is rather of "policing" character, designed only to assure that collective bargaining as a process engaged in by employers and employees will be possible. Not even union organization was to be promoted, although collective bargaining was to be encouraged. The Act assumes that by bargaining the

employees will reach agreements with employers more amicably, that there will be more industrial peace through fewer strikes, and that, therefore, purchasing power will be better maintained. The Act as designed is essentially an instrument dealing with rights and not with wage levels or the length of the work week, though it raises problems going beyond the ambit of political and economic rights. As public control legislation, the Act defined public policy and circumscribed certain employer activities in order to render the policy effective.

## Chapter III. CONSTITUTIONAL ISSUES

The Board early sought Supreme Court decisions on the constitutional issues, for which it carefully selected cases that would lay important and far-reaching groundwork. The "Labor Board cases," the decisions of which were handed down on April 12, 1937, are regarded generally as the cases wherein the fundamental constitutionality questions of the Wagner Act were answered. The Court decided five cases on that date, the most important of which was the *Jones & Laughlin* case. The other four cases hinged to a considerable extent upon the reasoning in that case.<sup>1</sup>

### A. May the Congress Regulate?

The first question presented was: May Congress regulate? Or, to state the issue differently: Do the unfair labor practices proscribed by the Act, and prohibited in a given case by a Board order, affect commerce? Do the facts demonstrate that interstate commerce is involved if the practices do affect commerce?

It was argued before the Court by the Jones & Laughlin Corporation that the act was, actually, a regulation of all industry and all industrial relations. The Supreme Court, however, pointed to the definition of "commerce" and the act's own limitation that it applied only when interstate commerce was affected; indeed, the Court went further and defined when commerce was affected:

<sup>1</sup> *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *N.L.R.B. v. Fruehauf Trailer Co.*, 301 U. S. 49 (1937); *N.L.R.B. v. Friedman-Harry Marks Clothing Co.*, 301 U. S. 58 (1937); *Associated Press v. N.L.R.B.*, 301 U. S. 103 (1937); *Washington, Virginia & Maryland Coach Co. v. N.L.R.B.*, 301 U. S. 142 (1937).

"This definition is one of exclusion as well as inclusion. The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds. It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes."<sup>2</sup>

With regard to unfair labor practices the Court held that they were no more than the safeguard for a long-standing and fundamental right. "Discrimination and coercion," said the Court, "to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority," and pointed to other cases before it in the past where the right had been upheld.

Production activities, which, it was argued, constituted manufacturing and, therefore, were without the aspects of interstate commerce, were held to be no excuse for violation of the proscriptions of the Act; and the Court stated that local activities which affected commerce clearly came within the interstate-commerce ambit. Applying to the specific case, the Court delivered the pregnant statement:

". . . In view of respondent's far-flung activities, it is idle to say that the effect would be indirect and remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and deal with the question of direct and indirect effects in an intellectual vacuum. Because there may be but indirect and remote effects upon interstate commerce in connection with a host of local enterprises throughout the country, it does not follow that other industrial activities do not have such a close and intimate relation to interstate commerce as to make the presence of industrial strife a matter of the most urgent national concern. When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities,

<sup>2</sup> *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937).

how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgement that does not ignore actual experience."<sup>3</sup>

The Court still insisted that the distinction between activities local and activities national in character must be maintained as vital to the maintenance of our Federal system; hence, whether particular action lay within Federal control would depend upon the individual cases arising.

### B. Is Substantive Due Process Violated?

The next question considered by the Court was whether, given the power to regulate, the means were adequate and related to the objectives sought? Was it unreasonable, arbitrary, or capricious to issue cease and desist orders to effectuate the policies of the Act?

The Court recognized that self-organization and collective bargaining lead to industrial peace and that the conference table and negotiation prevent strife. It approved, then, the various steps taken by the Board to effectuate the policy of the Act in light of the findings of fact and established that the regulation was reasonable, not arbitrary or capricious. The Court pointed out that:<sup>4</sup>

1. The statute restrained employers interfering with the right of employees to organize and bargain collectively. Such restraint could not be called arbitrary or capricious.
2. The employer must bargain with authorized representatives, but the Act does not preclude individual contracts.
3. The Act does not compel agreements between employers and employees.
4. The Act does not interfere with the right of the employer in hire or discharge if coercion and intimidation are absent. This is to be determined by the facts in each case.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

5. The right of the employer to conduct his own business can not be said to be arbitrarily restrained by regulations which protect the employees' rights.

6. If the Act is one-sided in that it subjects the employer to supervision and restraint and does not do so with employees, that is a matter of legislative policy, not legislative power.

7. Orders issued by the Board were authorized by the Act. Orders requiring reinstatement or back pay were valid and represented reasonable regulation because they were necessary to effectuate the policy, and the policy was based on facts to which the Court gave judicial recognition. The Seventh Amendment, providing for trial by jury in suits at common law where more than the sum of twenty dollars is involved, did not apply to back-pay orders because this was a statutory proceeding and not a proceeding at common law.

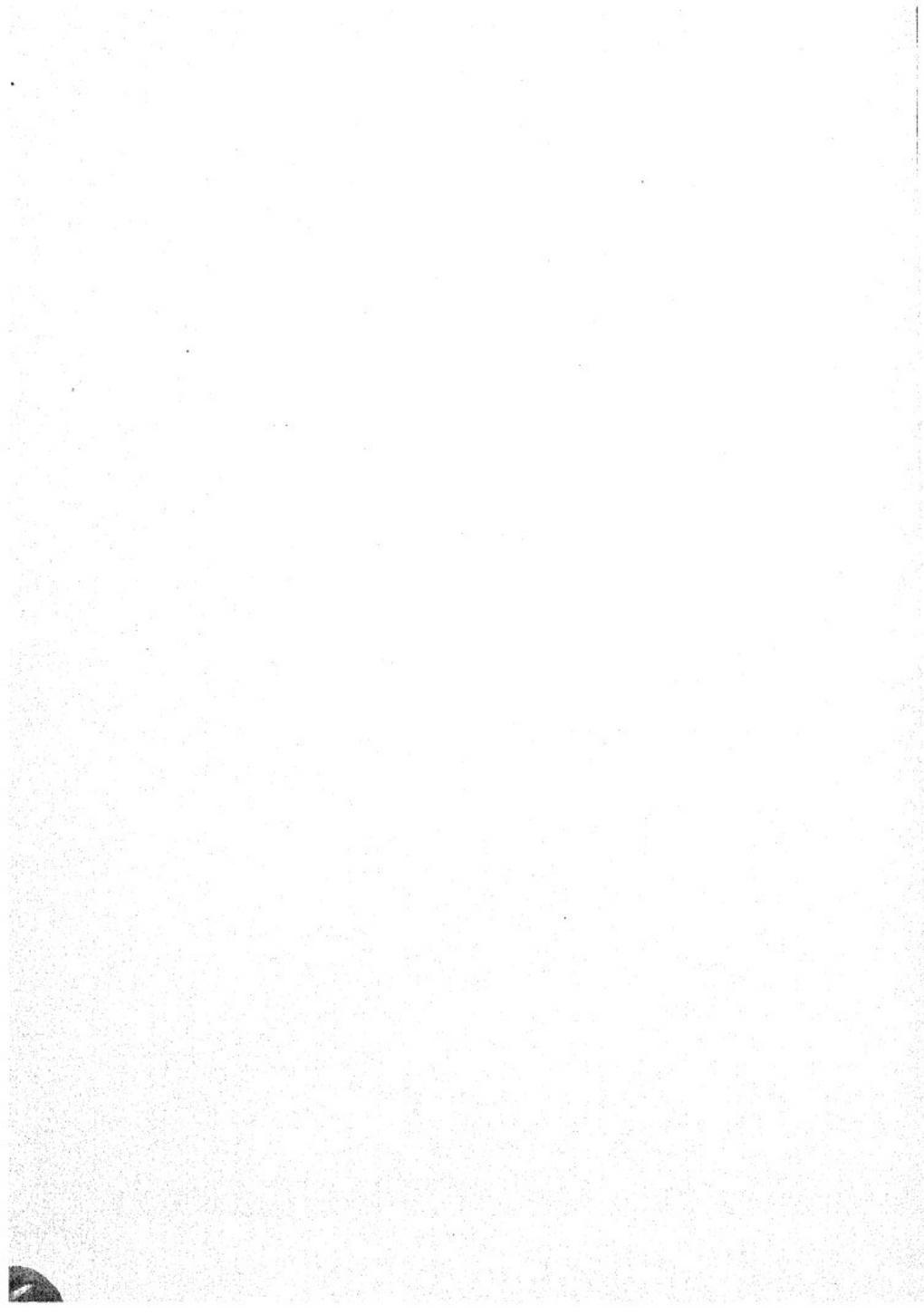
### C. Is Procedural Due Process Violated?

Assuming that Congress had the power to regulate, and assuming, too, that the means were related to the end to be attained, was the application of the means arbitrary, capricious, or unreasonable? Held the Court in the *Jones & Laughlin* case:

"The Act establishes standards to which the Board must conform. There must be complaint, notice, and hearing. The Board must receive evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of jurisdiction of the Board and regularity of its proceedings, all questions of constitutional right or statutory authority, are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation. . . . Respondent was notified and heard. It had opportunity to meet the charge of unfair labor practices upon the merits. . . . The facts found by the Board support its order and the evidence supports the findings. Respondent has no just ground for complaint on this score."<sup>5</sup>

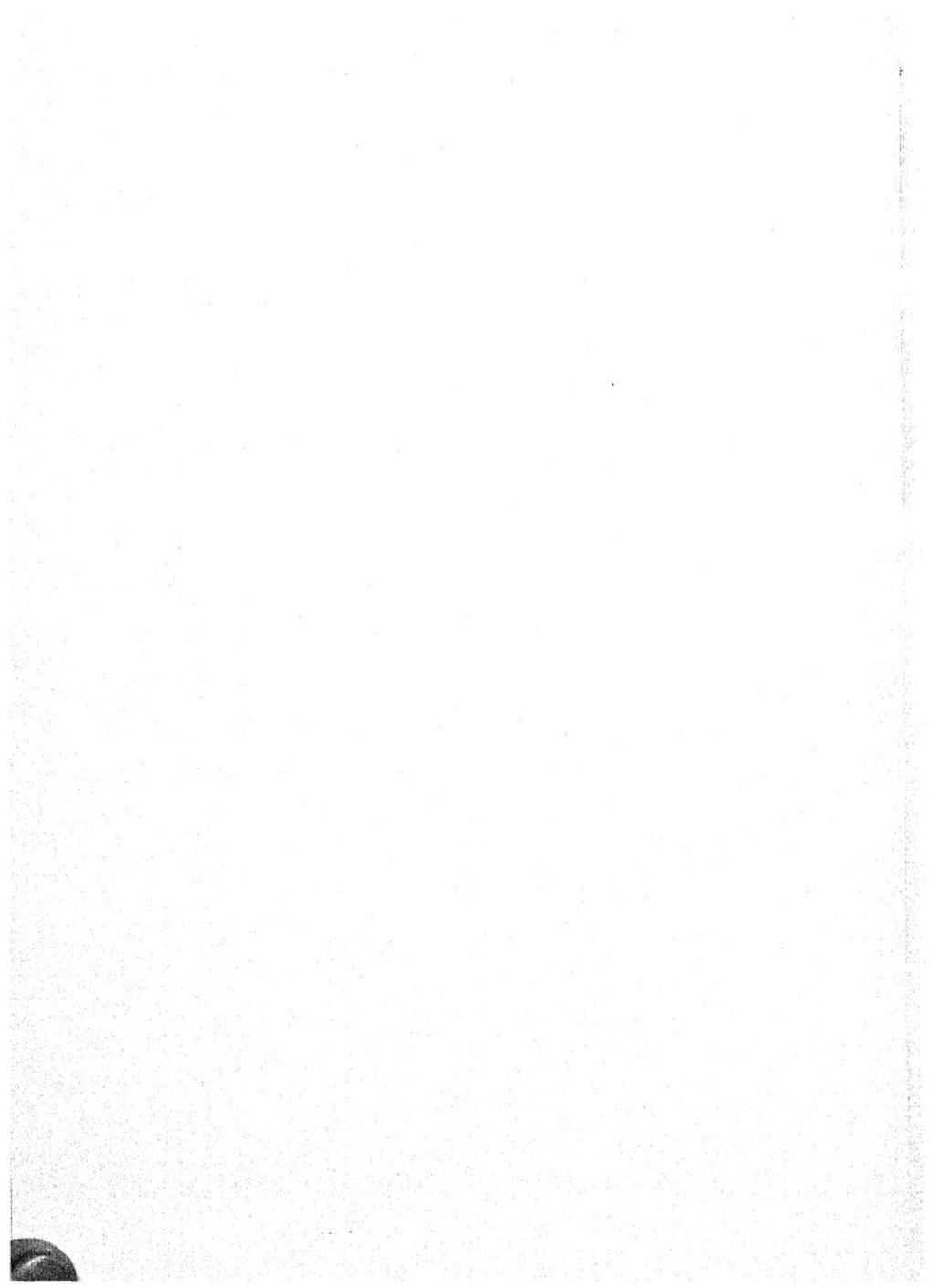
<sup>5</sup> *Ibid.*

The five cases which established the constitutionality of the Act did not, of course, constitute the only cases coming before the Supreme Court. During the next three years many cases were to be brought which would question the power of the Board, the findings of facts, or the procedure used by the Board. But the Act became significant in American life on April 12, 1937, and later cases were applications of the Act to specific factual situations.



*Part Two*

**Unfair Labor Practices**



## Chapter IV. UNFAIR LABOR PRACTICES

The protection of the right of self-organization and the right to bargain collectively under the National Labor Relations Act is positively asserted in Section 7: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." Section 7 is fortified by Section 8, which prohibits certain unfair labor practices.

Five subsections of Section 8 specify "particular" unfair practices. But the particularity is misleading, for subsection 1 is a blanket prohibition which not only includes the unfair practices listed in the remaining subsections but also permits the Board via decision to determine and cite as "unfair" practices which operate to prevent fulfillment of the Act's purpose.<sup>1</sup> Subsection 1 makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."<sup>2</sup> The Board has held that any employer violation of other subsections is, at once, a violation of the first. But not all violations of the first subsection are also violations of other subsections; hence, an analysis of cases falling under the first proscription will indicate practices not specified in other subsections as "unfair" but which have been held to interfere with, restrain, or coerce employees. In general, such practices are well-known employer tactics.

<sup>1</sup> The annual reports of the Board were chiefly relied upon to ascertain what types of employer activity violated the Act.

<sup>2</sup> See Section 8(1) of the Act, Appendix I.

### A. Employer Activity Regarded as Interference, Restraint, and Coercion

#### 1. Espionage

Employers and employees have long used espionage in the management-labor conflict. Employer espionage, in its many forms, has been condemned by the Board as an unfair labor practice. Espionage may be carried on by professional spies hired for the purpose, by regular employees induced to do so, by officials or supervisory employees, or by officials' confidential employees. In almost every case the espionage has been an activity engaged in to promote employer action deemed contrary to Section 7, such as discrimination in hire or tenure of employment. The Board holds, however, that espionage itself constitutes an unfair labor practice.<sup>3</sup>

#### 2. Bribery

The Board has found employers engaging in subtle and direct types of bribery. In the *McNeely and Price Co.* case<sup>4</sup> officials of the company attempted by bribery to induce unionists to change their affiliation; and the Board cited this as in itself an act of interference, restraint, and coercion. In the *Carlisle Lumber* case<sup>5</sup> the union representative was offered "a job in Seattle at a huge salary provided he would desert the union." In the *Stackpole Carbon* case<sup>6</sup> the plant manager informed two union men that the company ". . . would give them a building it had erected, to use as they saw fit. He suggested that they might use it for business purposes." Large-scale bribery has been cited by the Board in such instances as the *McNeely* case where, in an election, it was found "the respondent [company] promised and subsequently awarded vacations-with-pay in return for the general repudiation of an 'outside' union."

<sup>3</sup> See *Matter of Fruehauf Trailer Co.*, 1 N.L.R.B. 68; *Matter of Friedman-Harry Marks Clothing Co.*, 1 N.L.R.B. 411; *Matter of Martin Dyeing and Finishing Co.*, 2 N.L.R.B. 403; *Matter of Millfay Mfg. Co.*, 2 N.L.R.B. 919. As of June 1, 1939, the Board had rendered 44 decisions in which espionage had been found. Press release R-1781.

<sup>4</sup> 6 N.L.R.B. 800.

<sup>5</sup> 2 N.L.R.B. 248.

<sup>6</sup> 6 N.L.R.B. 171.

### 3. Propaganda

The Board has found employers engaging in all manner of propaganda in attempts to thwart the union. Propaganda having as its objective the avoidance of collective bargaining and infringement of the right to organize has been held an unfair practice in many cases. Because it is often subtle and coercive only in light of the facts, the propaganda is always viewed against the background in which it is found.

Statements and actions constituting propaganda for employer benefit have been held to be unfair practices in many different manifestations:

1. The making of anti-union addresses at mass plant meetings.
2. Discrediting the union and union leaders. This at times has meant vilifying the union members and organizers. It has been held by the Board to be a violation for employer representatives to appear at union meetings and heckle the speaker, because such action tends "to thwart union organization."
3. Threatening to close the plant, as in the *Remington-Rand* case,<sup>7</sup> where the plant did close and a "for sale" sign was displayed.
4. Threatening to go out of business, or threatening to move the business to another locality. The latter is a potent weapon in industries where the unit is mobile, as in shoes, or where the economic life of the whole community depends upon the employer.
5. The use of a newspaper to propagandize, or the use of "missionaries," the radio, rumors, and "back-to-work" movements.
6. The use of municipal authorities and business men to spread propaganda and to prevent union activity.<sup>8</sup>

### 4. Economic Pressure

Often an employer attempts to bring pressure against the individual to prevent the growth of a union. He may do this by such practices as threatening discharge of a union man, emphasizing

<sup>7</sup> 2 N.L.R.B. 626.

<sup>8</sup> See *Matter of Williams Manufacturing Co.*, 6 N.L.R.B. 135; *Matter of Sunshine Milling Co.*, 7 N.L.R.B. 1252; *Matter of Nebel Knitting Co.*, 6 N.L.R.B. 284; *Matter of Remington-Rand Co.*, 2 N.L.R.B. 626; *Matter of Regal Shirt Co.*, 4 N.L.R.B. 567.

ing protection for nonunionists, threatening eviction from company-owned houses, withholding credit at company stores, and use of the lockout.<sup>9</sup>

### 5. Individual Dealing

The employer may try to avoid a union by dealing directly with the individual. Often the employee is questioned with regard to his union activity or persuaded to refrain from joining some particular organization. Employers sometimes demand that employees sign individual applications to return to work following a strike, or the employer may approach each employee to return to work. It is not unknown for the employer to bargain individually by forcing the employee to sign a "yellow dog" contract. Often an employer has been found to have circulated a petition for employees to sign to the effect that they desire no outside union or organizers. This is sometimes followed by a secret-ballot vote where the employee in fact has no alternative but to vote for the employer's plan.<sup>10</sup>

### 6. Incitement to Violence

Employers have been held guilty of an unfair labor practice where it is clear that they have incited violence as a means of avoiding dealing with unions. The *Rand* case may be cited, and in part the Board's decision read:<sup>11</sup> "Scenes of disorder and violence, to be described to the public as riots, were staged. . . . In the planning of these disorders, the respondent exhibited the small value it placed on human life, for with even-handedness it stood willing to sacrifice the lives of the men whom it hired to break the strike as well as those of the strikers." In the *Clover Fork Coal* case<sup>12</sup> a mine superintendent said, "If one of my men will pick up a stick and whip hell out of one of them organizers,

<sup>9</sup> See *Matter of Pacific Greyhound Lines, Inc.*, 2 N.L.R.B. 431; *Matter of Harrisburg Children's Dress Co.*, 2 N.L.R.B. 1058; *Matter of Alaska Juneau Gold Mining Co.*, 2 N.L.R.B. 125; *Matter of Santa Cruz Fruit Packing Co.*, 1 N.L.R.B. 454.

<sup>10</sup> See *Matter of Metropolitan Engineering Co. and Metropolitan Device Corp.*, 4 N.L.R.B. 542; *Matter of Alaska Juneau Gold Mining Co.*, 2 N.L.R.B. 125; *Matter of Columbian Enameling and Stamping Co.*, 1 N.L.R.B. 181; *Matter of Atlas Bag and Burlap Co., Inc.*, 1 N.L.R.B. 292; *Matter of Clover Fork Coal Co.*, 4 N.L.R.B. 202.

<sup>11</sup> 2 N.L.R.B. 626.

<sup>12</sup> 4 N.L.R.B. 202.

I will go to Judge Gilbert and see he don't put in a day in jail and I will pay the fine."

### 7. *Strike-breakers*

The Act specifies that nothing therein shall limit the right to strike. The employment of professional strike-breakers has been held an unfair labor practice by the Board. Closely allied to the use of strike-breakers is that of "missionaries" or "union-wreckers," which has also been held a violation of the Act.<sup>13</sup>

### 8. *Miscellaneous Practices*

A large number of other practices, some of which violate other portions of the Act, have been found by the Board to violate the first proscription. Some of these are: The employer shows favoritism between two outside unions;<sup>14</sup> discrimination by the employer; the refusal by the employer to deal with representatives; the discharge of employees for concerted activity where the question of unionism was not involved but the employees acted spontaneously and concertedly; the employer's abrogation of seniority agreements with a union; company domination of the union by the employer; employer acquiescence in anti-union employees ejecting union employees from the plant; limitation of employees in their selection of representatives; pay increases by the employer to forestall a union trend; the distortion of the significance of the Act by the employer; the intimidation of the employees by supervisors of the respondent; the formation of vigilantes, the formation of employee committees, action intended to intimidate strikers and pickets, and the sending of telegrams to the governor of a state asking for militia; the intimidation of the employee for testifying under the Act; a change in the method of doing business for the purpose of avoiding the Act.<sup>15</sup>

<sup>13</sup> See *Matter of Elbe File and Binder Co., Inc.*, 2 N.L.R.B. 906; *Matter of Remington-Rand Co.*, 2 N.L.R.B. 626.

<sup>14</sup> This issue often arises because of the split in the labor movement. When employers show favoritism for the CIO or AF of L affiliate, the Act is violated even though there is no company domination of the union. The issue may also arise when an employer favors an affiliate of a national organization as against a truly independent organization, or vice versa.

<sup>15</sup> See *Matter of Lenox Shoe Co., Inc.*, 4 N.L.R.B. 372; *Matter of Indianapolis Glove Co.*, 5 N.L.R.B. 231; *Matter of Brown Shoe Co., Inc.*, 1 N.L.R.B. 803; *Matter of Altorfer Bros. Co.*, 5 N.L.R.B. 713; *Matter of Wallace Mfg. Co., Inc.*, 2 N.L.R.B. 1081; *Matter of the A. S. Abell Co.*, 5 N.L.R.B. 644; *Matter of Jacob A. Hunkele*, 7 N.L.R.B. 1276.

### B. Company Domination of Employee Organizations

One of the issues emphasized during congressional debate on the Act was company unionism. In the hearing on the Wagner Bill, Senator Wagner developed from employee witnesses the means by which many employers dominated "independent" unions. The N.I.R.A. experience had revealed that a specific prohibition was necessary to prevent the circumvention of trade unionism and collective bargaining through the formation of puppet organizations by employers. Consequently it is made an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that subject to rules and regulations made and published by the Board . . . an employer shall not be prohibited from permitting employees to confer with him during work hours without loss of time or pay."<sup>16</sup> The techniques used by employers vary from subtle to overt acts of violation. The Board met the problem of definition, but through case decisions it gave content to "domination," "interference," "formation," and "administration."

To be a "labor organization" under the Act, the purpose of existence "in whole or in part" must be to deal with employers "concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>17</sup> Thus, the Act applies to all company-dominated unions unless they are for purely social purposes. In the Board's experience are to be found all types of employee organizations and varying degrees of organization development, which range from the mature union to the sheerest skeletons of collective action. The Board has held, for instance, that a labor organization existed when there were no officers, no bylaws, no dues, no eligibility rules, no meetings by the members, and but one document, which was a petition signed by the men acknowledging that their superior officers constituted a bargaining committee.<sup>18</sup>

The Board has held consistently that the officers and supervisory employees act for the employer and that their acts, there-

<sup>16</sup> See Section 8(2) of the Act, Appendix I.

<sup>17</sup> Section 2(5). See Appendix I.

<sup>18</sup> *Matter of Virginia Ferry Corp.*, 8 N.L.R.B. 730.

fore, constitute a violation if the proscribed results are produced or intended to be produced. It seems patent that the executive and production officials would be held responsible for activities. Such officials include the president, vice-president, secretary, and treasurer of a corporate employer, as well as a general manager, a plant superintendent, a departmental superintendent, a foreman, or a personnel director.<sup>19</sup> Below the higher reaches of the hierarchy of policy-determination, however, it often becomes difficult to ascertain who is responsible for labor policy; and the Board determines each case on its merits. The chief factor relied upon by the Board is whether the employee acts in a supervisory capacity rather than in the capacity denoted by the title or rank accorded him. Always subject to modification in light of facts, the Board presumably will hold that supervisory capacity is involved where the employee has "power to hire and discharge, or the power to recommend hiring, discharging, or the granting of wage increases, or those whose duties include apportioning work, enforcing discipline, or maintaining productivity."<sup>20</sup> The Board may even find a violation if the employer works through third parties such as prominent citizens or businessmen groups.<sup>21</sup>

The ingenuity of some employers in attempting to avoid a violation of the company-domination proscription, while accomplishing the ends desired, is impressive. The Board may be said to match such ingenuity, however, and it discovers all manner of activities. A number of such activities may be indicated, which demonstrate but do not exhaust the types of activities held illegal.

1. The employer evades the outside union but recognizes the inside union, deals with it, encourages its growth, and expresses his preference for it.

2. The employer posts notices praising the inside union when the employer's antagonism to outside unionism is known or demonstrated by other circumstances.

3. The employer furnishes the local union with a constitution,

<sup>19</sup> Third Annual Report, N.L.R.B., pp. 110-111.

<sup>20</sup> *Ibid.*, p. 181.

<sup>21</sup> *Matter of Regal Shirt Co.*, 4 N.L.R.B. 567. In this case the mayor, businessmen, and prominent citizens endeavored to dissuade workers from joining the union. These parties had a "financial stake" in the business via "general business." The Board held the respondent in violation of the Act by his "failure to disclaim the mayor's statements. . ." The respondent's officers had also discouraged the union.

bylaws, and propaganda which indicate employer approval of the local. Without investigation, the employer accepts the local union's claim that it represents a majority; and the employer thereupon proposes a contract for exclusive representation.

4. The employer furnishes the union with supplies and money and permits employees to solicit inside-union membership on company time. Allied to that is the practice whereby the employer furnishes a lawyer to aid in forming an inside union and drawing a contract between the employer and the inside union.

5. The foremen and assistants of the employer circulate a paper favoring an inside union, thereby leading others to organize the inside union.

6. The personnel director of the employer heads an association and supervisors collect dues. The employer indirectly makes possible an income to the association.

7. The personnel director and general managers form an employee-representation plan which still leaves the employer with veto power over amendments and committee action.

8. The employer diverts employees' organizing desires from an outside union to an inside union by speech and action which indicate the employer's attitude toward the outside union, although the employer's words assure the worker freedom of choice between no union, an outside, or inside union.

9. The employees have the semblance but not the substance of collective action when membership in a "plan" hinges on employment and not free choice, the "plan" is financially supported by the employer by indirection, and ability of employees to change the "plan" is subject to the employer's desires.

10. Supervisory employees disparage a rival labor organization.

11. The employer renders support by deducting from the employee's pay a sum which is divided between the favored "association" and the company's health and benefit plan.

12. The employer threatens to dismiss employees if they do not join a preferred organization.

13. The employer dismisses employees if they do not join a preferred organization.

14. The employer opposes the outside union and recognizes the inside union or association as a bulwark of protection. He may even grant demands as part of the strategy. Where there is

an inside union, the Board investigates the nature and extent of collective bargaining to aid in ascertaining the independence of the inside union.<sup>22</sup>

### C. Discrimination With Regard to Labor Organizations

The third proscription makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."<sup>23</sup> There is a provision legitimatizing a closed-shop contract where the employer and the organization so agree provided the organization represents a majority in the unit appropriate for collective bargaining.

Many of the cases coming before the Board charge a violation of this proscription. Frequently the violation is clear and may even be uncontradicted by the employer. But the employer will often attempt to camouflage the real motivation for violation of the Act; hence the Board must arrive at its decision by considering the labor-relations background, the attitude of the employer both before and after passage of the Act, the practices carried on in different types of business, and the circumstances of each case. It thus becomes difficult to obtain a pattern of employer action which could be said to be in violation of the Act. Some types of action which illustrate employer violations may be listed:

1. The employee is discouraged outright because he is member of, or active in, a labor organization which the employer opposes.
2. Because of union activity, the employee is discriminatorily locked out following a strike.

<sup>22</sup> See *Matter of Sterling Electric Motors, Inc.*, 8 N.L.R.B. 173; *Matter of the Pure Oil Co.*, 8 N.L.R.B. 207; *Matter of Lone Star Bag and Bagging Co.*, 8 N.L.R.B. 244; *Matter of Ronni Parfum, Inc.*, 8 N.L.R.B. 323; *Matter of Elkland Leather Co., Inc.*, 8 N.L.R.B. 519; *Matter of Serrick Corp.*, 8 N.L.R.B. 621; *Matter of Newport News Shipbuilding and Dry Dock Co.*, 8 N.L.R.B. 866; *Matter of Crawford Mfg. Co.*, 8 N.L.R.B. 1237; *Matter of H. E. Fletcher Co.*, 5 N.L.R.B. 729; *Matter of Industrial Rayon Corp.*, 7 N.L.R.B. 878; *Matter of Phillips Packing Co.*, 5 N.L.R.B. 272; *Matter of Highway Trailer Co.*, 3 N.L.R.B. 591; *Matter of American Potash and Chemical Ass'n.*, 3 N.L.R.B. 140; *Matter of S. Blechman & Sons, Inc.*, 4 N.L.R.B. 15.

<sup>23</sup> See Appendix I, Section 8(3).

3. The employee is rehired after a lockout only to be discharged for apparent good cause.
4. The employer discourages membership in one organization's affiliate and encourages membership in another organization's affiliate by failing to reinstate employees not members of the favored organization after the plant reopens.
5. The employer discharges on false grounds of inefficiency.
6. The employee is laid off ostensibly because of reduction in force, shutdown of a department, work shortage, etc., when in fact discrimination because of unionism is involved as shown by less competent or less experienced persons being retained or transferred or rehired.
7. The employee is rehired after a strike but is harassed until the job becomes unbearable and he is forced to quit.
8. The employee is discharged because of a refusal to join a union with which the employer has a closed-shop contract, yet the labor organization is not free of employer domination.
9. The employee is discharged because he kept union literature in his locker and wore a union button.
10. The employee is transferred to a less remunerative job or to a job entailing other disadvantages because of the employer's opposition to the union.
11. The employee is discharged because the nature of the business demands an absence of union activity.
12. The employer discriminates against one affiliate at the expense of another in order to avoid the consequences of a jurisdictional dispute.
13. The employer refuses employment because the applicant is a union member, or has been active in union matters.<sup>21</sup>

<sup>21</sup> See *Matter of American Potash and Chemical Ass'n*, 3 N.L.R.B. 140; *Matter of Mackay Radio & Telegraph Co.*, 1 N.L.R.B. 201; *Matter of Miller Corsets, Inc.*, 8 N.L.R.B. 12; *Matter of Electric Vacuum Cleaner Co.*, 8 N.L.R.B. 112; *Matter of Shellabarger Grain Products Co.*, 8 N.L.R.B. 336; *Matter of Lone Star Bag and Bagging Co.*, 8 N.L.R.B. 244; *Matter of Mock-Judson-Voehringer Co. of North Carolina, Inc.*, 8 N.L.R.B. 133; *Matter of David Strain Co., Inc.*, 8 N.L.R.B. 310; *Matter of Crosset Lumber Co.*, 8 N.L.R.B. 440; *Matter of Serrick Corp.*, 8 N.L.R.B. 621; *Matter of Armour & Co.*, 8 N.L.R.B. 1100; *Matter of Harlan Fuel Co.*, 8 N.L.R.B. 25; *Matter of Eastern Footwear Corp.*, 8 N.L.R.B. 1245; *Matter of Associated Press and American Newspaper Guild*, 1 N.L.R.B. 788; *Matter of Star Publishing Co.*, 4 N.L.R.B. 498; *Matter of Montgomery Ward and Co.*, 4 N.L.R.B. 1151.

#### D. Retaliatory Discrimination

It is made an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."<sup>25</sup> This section has given rise to comparatively few cases. Apparently those employers who have been found guilty of violating the Act do not seriously discriminate against employees who have brought charges or given testimony. The proscription is clear and definite; and few problems of interpretation arise, although the Board may be faced with determining whether an employee is actually discharged or discriminated against for giving testimony or whether inefficiency or some other reason is the cause of employer action. Only rarely does a complaint in this category reach the decision stage.<sup>26</sup>

#### E. Refusal to Bargain Collectively

It is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." <sup>27</sup> Section 9(a) is thus related to 8(5); and the question of the appropriate unit is attached to the unfair labor practices, for Section 9(a) is the provision which specifies that the representatives designated by the majority in an appropriate unit shall be the exclusive representatives for all employees in the unit. Therefore, in many cases the question of the appropriate unit and the determination of a majority are linked with the charge that the employer has refused to bargain.

The two rights the Act is designed to protect—to organize, and to bargain collectively—are separate ones, but the right to organize has more meaning if through organization the employees

<sup>25</sup> See Appendix I, Section 8(4).

<sup>26</sup> Violations are rarely cited, even by the Board's annual reports. For example, of the 6807 complaint cases received in the year ending June 30, 1938, only 82 included charges of employer violation of this proscription. See N.L.R.B. Third Annual Report, p. 29. For cases, see *Matter of Aluminum Products Co., et al.*, 7 N.L.R.B. 1219; *Matter of Friedman-Harry Marks Clothing Co., Inc.*, 1 N.L.R.B. 411; *Matter of Fruehauf Trailer Co.*, 1 N.L.R.B. 68.

<sup>27</sup> See Appendix I, Section 8(5).

bargain collectively. The Act seems to emphasize that the objective is to promote collective bargaining; hence, even if there were no violation of the first four of the enumerated unfair labor practices, the employer could still refuse to bargain, and each party would have to rely on economic weapons. Since the Act seeks to avoid this alternative, the refusal to bargain is made an unfair labor practice. Such refusal may be excusable where the employer in good faith does not know with whom to bargain, and in such event the Board will certify the proper representatives by use of its powers under the Act. What employer activities constitute a refusal to bargain collectively?

1. A refusal by the employer to meet and negotiate with the representatives.

2. The employer negotiates with unauthorized representatives when authorized representatives have been properly chosen by the employees.

3. The employer deals with the individual employees when there is a properly chosen representative; or he signs a closed-shop agreement with a minority union when a union representing a majority exists, and he makes no effort to ascertain which union represents the majority of the employees; or he refuses to cooperate, in the event there are competing unions, with a union attempting to prove a majority status.

4. The employer refuses to meet with representatives before or during a strike (even if the strike is brought on by misinformation and unsubstantiated claims on the part of union leaders). Nor does misconduct on the part of the strikers excuse the employer from his responsibility.<sup>28</sup>

5. The employer refuses to bargain because his competitors

<sup>28</sup> *Matter of Remington-Rand*, *supra*. There are limitations, however. In the *Fansteel* case, 306 U. S. 240 (1939), the Supreme Court held that the employer was under no duty to reinstate sit-down strikers whom he had discharged for illegal conduct even if the unfair practices of the employer brought on the strike. (That is, a wrong by the employer will not justify a wrong by the employee.) Moreover, the Court held there was no violation if the employer, after discharging the sit-down strikers and hiring new men, refused to bargain collectively with the same union in the absence of proof that the union was still the proper representative.

In *N.L.R.B. v. Columbian Enameling and Stamping Co.*, 306 U. S. 292 (1939), the Court held that an employer does not violate the Act if the union does not proffer negotiations. ". . . The statute does not compel him to seek out his employees or request their participation in negotiations for purposes of collective bargaining . . ."

have not "entered into negotiations or made agreements with their employees."

6. The employer refuses to meet with the representative of the majority because the representative is "an outsider," even when the outsider is admittedly the representative of a majority.

7. The employer does not deny that the representative acts for a majority but refuses to negotiate on the grounds that the union demanded a signed contract and a closed-shop; that is, certain issues are refused as subjects of negotiation even when the employer does meet with the representative.

8. The employer receives and perhaps adjusts individual grievances and offers such action as collective bargaining, but he refuses negotiation with employees as a group on wages, hours, and working conditions.

9. The employer and the representatives carry on discussion and reach an understanding which the employer refuses to incorporate into a formal binding agreement for a definite term, but the new understanding is made a part of company policy. Or the employer may even reach a "mutually satisfactory understanding" with the union representatives but refuse to enter into an agreement with the union, although he will insist upon written contracts with the individual employees. Too, the employer may bargain and reach an agreement but refuse to enter into a signed agreement.

10. The employer refuses to continue negotiations because the union, during negotiations, alters its proposed terms.

11. The employer meets with and readily participates in discussion but rejects all proposals of the representatives and makes no counter-proposal.

12. The employer answers a request to bargain by discharging employees who refuse to forego union affiliation.

13. The employer meets, discusses, and offers counter-proposals to the representatives, but the intent is to delay and to hamper and not to consummate an agreement.

14. The employer bargains until an impasse is reached but refuses to continue negotiations when conditions change.

15. The employer bargains through agents not authorized to reach an agreement in order to give semblance without substance to bargaining.

16. The employer puts forth adverse, competitive conditions as a reason for not bargaining.
17. The employer undermines the union and then refuses to bargain on the ground that the union does not represent a majority.
18. The employer will meet with union representatives and treat with them as a committee of employees but will not recognize the union as such.
19. The employer agrees to bargain with union representatives for only the members of the union even where the union is the exclusive representative for all employees in the appropriate unit.<sup>29</sup>

<sup>29</sup> See *Matter of Suburban Lumber Co.*, 3 N.L.R.B. 194; *Matter of Shell Oil Co.*, 2 N.L.R.B. 835; *Matter of Atlas Bag & Burlap Co., Inc.*, 1 N.L.R.B. 292; *Matter of National Motor Bearing Co.*, 5 N.L.R.B. 409; *Matter of Rabhor Co., Inc.*, 1 N.L.R.B. 470; *Matter of Harbor Boat Building Co.*, 1 N.L.R.B. 349; *Matter of Millfay Mfg. Co.*, 2 N.L.R.B. 919; *Matter of U.S. Stamping Co.*, 5 N.L.R.B. 172; *Matter of Atlantic Refining Co.*, 1 N.L.R.B. 359; *Matter of St. Joseph Stockyards Co.*, 2 N.L.R.B. 39; *Matter of Federal Carton Corp.*, 5 N.L.R.B. 879; *Matter of Inland Steel Co.*, 9 N.L.R.B. 783; *Matter of Globe Cotton Mills*, 6 N.L.R.B. 461; *Matter of Atlas Mills, Inc.*, 3 N.L.R.B. 10; *Matter of Jeffry-Dewitt Insulator Co.*, 1 N.L.R.B. 618; *Matter of Agwilines, Inc.*, 2 N.L.R.B. 1; *Matter of Kiddie Kover Mfg. Co.*, 6 N.L.R.B. 355; *Matter of Griswold Mfg. Co.*, 6 N.L.R.B. 298; *Matter of Biles-Coleman Lumber Co.*, 4 N.L.R.B. 679.

## Chapter V. REMEDIES FOR UNFAIR LABOR PRACTICES

### A. General

Section 10(c) of the Act empowers the Board order. In event the Board is "of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."<sup>1</sup> Thus, a violation under this provision makes mandatory the issuance of a cease and desist order; and it also permits the Board to make additional requirement of an affirmative nature, such as reinstatement with back pay. The power of the Board to issue orders is, therefore, somewhat comparable to that of an equity court, where relief is ordered to fit the particular case at hand. The action ordered by the Board, however, is circumscribed by a phrase which limits the Board to orders such as "will effectuate the policies" of the Act; that is, to protect the right of self-organization and collective bargaining. Thus, the action of the Board in ordering relief is always based upon the particular case; and the approach is always that the Act is to enforce public, not private, rights. The relief is to remedy a violation of a public statute so that any benefit accruing to the individual is incidental.

Nor does the reinstatement and back-pay statement operate as a qualification upon the power of the Board in ordering affirmative action if that action effectuates the policy. The House Committee report contemplated that reinstatement with back pay was not exclusive when it stated:

<sup>1</sup> See Appendix I, Section 10(c).

"The orders will of course be adapted to the needs of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices. The most frequent form of affirmative action required in cases of this type is specifically provided for, *i.e.*, the reinstatement of employees with or without back pay, as the circumstances dictate."<sup>2</sup>

As regards statutory authority, Section 10(c), while in itself perhaps a potential source of strong sanctions, is mild by comparison with the sanctions afforded other agencies comparable in character. It may be stressed that there are no penalties which attach to a violation of the section proscribing unfair labor practices, nor are there penalties attached even to a Board order, until after a circuit court of appeals affirms the Board order after a full review and hearing before the court. This is in contrast with the penalties attaching to violations of the statutes or final orders of such agencies as the Interstate Commerce Commission, the Federal Trade Commission, the Securities and Exchange Commission, the United States Maritime Commission, and others, where civil and criminal money fines or forfeitures are imposed. The orders of some agencies (Interstate Commerce Commission and Federal Communications Commission) become operative when made, or in others become operative, final, and self-enforcing unless there is application for court review within a specified period of time; and no such advantage is possessed by the Board.<sup>3</sup> The mildness of the sanctions has given rise to some demand that the Act be amended so that criminal penalties may be imposed for violations. The chief argument in support of such demand is that such

<sup>2</sup> H. Report No. 1147, 74th Congress, 1st Session, p. 24.

<sup>3</sup> See the testimony of Charles Fahy before the Senate Labor Committee, Senate Hearings on Proposed Amendments to the National Labor Relations Act, 76th Congress, 1st Session, Part 2, p. 389. If Board orders were self-enforcing, probably far less of the Board's resources would need to be spent in litigation. The initiative would be shifted to the employer, who would be more likely to comply with Board orders. At least it would be the employer's responsibility to show cause why he should not comply with the Act rather than the Board's responsibility to ask the court to enforce compliance.

References to Senate and House Hearings on Proposed Amendments to the National Labor Relations Act, 76th Congress, 1st-3rd Sessions, will hereafter be designated S. (or H.) Hearings on N.L.R.A.

an amendment would bring the Wagner Act in closer correspondence with the railroad legislation, and compliance would follow.<sup>4</sup> Such an amendment may not be necessary since violations already may mean a severe back-pay burden to the employer under the necessity of his making whole any losses caused by his violation of the Act.

Typically, a Board order is divided into two portions: The negative portion, which includes the cease and desist order; and the affirmative portion, which requires positive action by the respondent.

### B. The Negative Portion of an Order

The number of parts in a cease and desist order depends upon the number of violations. The employer is ordered by the Board to cease and desist from each unfair labor practice found. For example, he may be ordered to cease and desist from discouraging membership in a union (affiliate of a national organization) by discrimination, or to cease dominating and interfering with the formation or administration of any other labor organization (the company union found). If there is a contract between a company union and the employer, there will be a paragraph ordering the employer to cease giving effect to such contract, as there will also be in the case where the employer has been found to be supporting or otherwise encouraging the affiliate of a national organization.

In addition to the specific and particular action to which the cease and desist order is directed, until March 3, 1941, there was a broad and inclusive paragraph in each cease and desist order:

"In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection as guaranteed in Section 7 of the Act." This prohibition really matched the broad proscription of subsection 1 of Section 8, while the specific prohibitions written

<sup>4</sup> CIO's 1940 Legislative Program For Jobs, Peace, and Security, Publication No. 38 (CIO), p. 7.

in each paragraph of a cease and desist order matched the other four subsections of Section 8.<sup>5</sup> Since, under the Board's rulings, any violation found in subsections 2, 3, 4, or 5 of Section 8 was at once a violation of subsection 1, then it followed that every order carried the comprehensive prohibition as well as the specific proscriptions.

Considerable interest attached to the use of the comprehensive paragraph in Board orders. Did not the use of such an article really constitute "Government by Injunction," which was one evil the Norris-La Guardia Act was designed to correct? The breadth of subsection 8(1) is unassailable: It is made an unfair labor practice for the employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by the Act. The words "interfere," "restrain," and "coerce" were applied, then, to Section 7, which matches subsection 8(1) in breadth and inclusiveness: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." Obviously any activity which can be construed as interference, restraint, or coercion will violate the rights listed in Section 7. Does this construction do violence to the alleged specificity of the Act? The Senate report in part read:

" . . . The Committee wishes to emphasize two points. In the first place, the unfair labor practices under the purview of this bill are strictly limited to those enumerated in Section 8. This is made clear by paragraph 8 of Section 2, which provides that 'The term 'unfair labor practice' means any unfair labor practice listed in Section 8,' and by Section 10(a) empowering the Board to prevent any unfair labor practice 'listed in Section 8.' Unlike the Federal Trade Commission Act, which deals somewhat analogously with unfair trade practices, *this bill is specific in its terms*. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair . . . .

<sup>5</sup>The four succeeding unfair labor practices are designed *not to*

<sup>5</sup>See Appendix I, Sections 7 and 8.

*impose limitations or restrictions upon the general guaranties of the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome.”<sup>6</sup>*

The House reported in part:

*“The succeeding unfair labor practices are intended to amplify and state more specifically certain types of interference and restraint that experience has proved require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4), and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1).”<sup>7</sup>*

It is true that the use of the singular when empowering the Board to prevent, upon a finding, “such unfair labor practice” would lead one to believe that a blanket prohibition could not be used and that the Act was far more specific than the Federal Trade Commission Act. But, on the contrary, the Board could determine “interference, restraint, or coercion”; and these were the “general guaranties” provided by the Act.

When the Board issued its order reading, *“In any other manner interfering with, restraining, or coercing”* employees in violation of the rights guaranteed in Section 7, the Board was commanding that the law not be violated. The vagueness and breadth of the Board order meant that a violation in the indefinite future would render the employer liable for contempt if a circuit court of appeals had upheld an order covering indefinite employer activity. If the Norris-La Guardia Act was justified in part on the ground of vague injunctions, then the employer could argue a correlative justification for less-inclusive Board orders. The broad Board order thus ran against the consensus, courts and otherwise, that a decree which enjoins (and surely a Board order does that) should be as specific as possible in describing the conduct enjoined.

The circuit courts of appeal, when confronted by employers’ arguments that Board orders were beyond Board powers, disagreed as to whether activities which violated specific portions of

<sup>6</sup> S. Report No. 573, on S. 1958, 74th Congress, 1st Session, pp. 8-9. Italics supplied.

<sup>7</sup> H. Report No. 1147, on S. 1958, 74th Congress, 1st Session, p. 17.

the Act at the same time violated the proscription against interference, restraint, or coercion. If the court held the specific violations to be species of the generic unfair labor practice (interference, restraint, or coercion), it would approve the broad portion of the Board order; if it did not, and thereby ignored congressional intent, then it would refuse to enforce the broad portion of the Board's order. Too, the generality of the language in Board orders meant confusion in the circuit courts.<sup>8</sup>

The injunctive order of the Board was squarely presented to the Supreme Court in the *Express Publishing Co.* case.<sup>9</sup> There the Board had found that the employer refused to bargain collectively and he was ordered to cease and desist from such refusal. "Having provided the recommended remedy by the provisions of its order directing the respondent to bargain and to cease and desist from refusing to bargain the Board went further and ordered broadly that respondent should in effect refrain from violating the Act in any manner whatsoever."<sup>10</sup>

Before the Court the Board justified its "in any manner" portion of the order on the grounds that refusal to bargain was also a violation of the Act's proscription against interference, restraint, or coercion; that the general proscription incorporated by reference all the rights guaranteed by Section 7 of the Act; that therefore the Board could restrain not only committed violations but also any other practices which infringed on the enumerated rights of Section 7, even if such practices were unrelated to the violations which the Board had found through its regular processes.

The Court agreed that specific violations also constituted violation of the general proscription. But the Court did not agree that the Board was justified in issuing a blanket order which would restrain the employer from committing any violation, however unrelated such violation might be to that found by the Board. Nor were the courts for an indefinite future required to give effect through contempt proceedings to such a broad Board order. The Court reasoned that a Board order may become the subject of contempt proceedings, it was analogous to a court's injunctive

<sup>8</sup> See, for example, the *Art Metals Construction Co.* case, 110 F. (2d) 148, CCA-2, and the *Remington Rand* case, 94 F. (2d) 862, CCA-2.

<sup>9</sup> *N.L.R.B. v. Express Publishing Co.*, 312 U. S. 426 (1941).

<sup>10</sup> From the Court's decision, *Ibid.*

order, and therefore the Board order should state with reasonable specificity the acts which the employer is to do or refrain from doing. No court, it was said, could issue an injunctive order to prevent a future violation which would be unlike and unrelated to the violation originally charged. A violation by an employer of one of the Act's proscriptions may be wholly unrelated to other proscriptions. Congress did not intend that the Board should make or that courts should enforce Board orders that could not be appropriately made in judicial proceedings. Moreover, the Act did not contemplate that an employer found guilty of one violation would be required to carry on future labor relations at his peril. Held the Court, then, that the Act did not authorize the Board to restrain all violations of the statute merely because one violation had been found. For an order restraining other violations, there must be some resemblance to committed violations or the danger of commission of such violations, anticipated from past conduct. This holding, however, did not permit an employer to evade a Board order through indirection. The Court modified the order to read: "In any manner interfering with the efforts of the [union] to bargain collectively with [the respondent]."<sup>11</sup>

### C. The Affirmative Portion of an Order

The affirmative portion of an order is always of a specific nature, and each article of the order must in itself be designed "to effectuate the policies of the Act." In a broad sense, the affirmative portions constitute a positive statement of the command to the employer implicit in the negative portion of the order. The suggested remedy in the Act—reinstatement with or without back pay—is perhaps the outstanding action ordered; but the Board may also order that the employer withdraw recognition and disestablish a company union which it has found; it may order the employer to bargain collectively with the certified representatives of the employees; it may order the posting of notices, including a notice that it has withdrawn recognition; or it may require the employer to notify the regional director within a specified period what steps have been taken to comply with the order.

<sup>11</sup> *Ibid.*

### 1. *Reinstatement with Back Pay*

The Act's authorization for a reinstatement order with or without back pay has been heavily used by the Board and seldom has been challenged in the courts. The efficacy of the order has been uniformly upheld by the circuit courts as well as by the Supreme Court when challenged. In the Supreme Court the order was at issue in the *Jones & Laughlin, Mackay, and Santa Cruz* cases.<sup>12</sup> Usually the reinstatement and back pay are found together; but they may not be if, for example, the employee has found approximately equivalent work elsewhere in the interim or if he does not desire to return.

When reinstatement is ordered, it is contemplated that the employee will return to the same task, or its equivalent. This may be impossible because of changed conditions, although the Board will order the dismissal of persons hired to replace the employee in order to secure reinstatement, if necessary. If, however, there has been such a change in conditions that the employee can not possibly be used, then the Board will amend its order to the effect that the employee be put on a preferential hiring list. Preferential hiring was one of the issues in the *Republic Steel* case,<sup>13</sup> for in that case the Board had ordered a single preferential hiring list for all the plants of the corporation. The Circuit Court of Appeals, however, held that the Board had the power to make such an order and further stated that the Board had not abused its discretion in the matter.

The Board has received much condemnation in the editorials of the press and from employers of the nature that accuses the Board of encouraging the sit-down strike and violence. The *Fansteel* decision<sup>14</sup> is usually quoted as evidence of the truth of the assertion. It may be pointed out that the Board will not order reinstatement where the employee has been convicted of violence

<sup>12</sup> 301 U. S. 1 (1937); 304 U. S. 333 (1938); and 303 U. S. 453 (1938), respectively. This issue was also involved in the *Republic Steel* case, 107 F. (2d) 472, CCA-3, certiorari denied by the Supreme Court, April 8, 1940, 309 U. S. 684. The order denying certiorari was vacated May 8, 1940, and certiorari granted for review of that portion of the Board's order pertaining to relief payments. The courts sustain the Board on the general principle that no man who suffers wrong is to bear the loss. Rather, the one who does the wrong must bear the loss.

<sup>13</sup> *Ibid.*

<sup>14</sup> *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939).

or disorder of some serious nature in the criminal courts, and such disbarment came before the *Fansteel* decision was rendered by the Supreme Court. The Board order in the *Republic Steel* case, for example, issued four months prior to the *Fansteel* decision, refused reinstatement to "strikers who had been convicted of possession and use of explosives, malicious destruction of property to the value of \$300, and possession of a bomb, all felonies. . . ." <sup>15</sup> The Board in that case did not go quite far enough, however, for it regarded as less serious and not constituting a bar to reinstatement such acts as unlawfully obstructing and retarding the passage of United States mails, discharging firearms, malicious destruction of property to a value of less than \$300, unlawfully interfering with telegraph or telephone messages, transporting explosives, carrying concealed weapons, assault and battery, and activities sufficiently serious to the circuit court as to merit a bar to reinstatement.

The objective of the back-pay order is to make good the losses accruing to employees because of the employer's violation of the law. The power to order back pay is broad and is limited only by the purposes of the Act; but in actuality the power is concomitant with the power of the Board to order reinstatement, and the two are seldom separated. The Board has ordered back pay for as long a period as three and one-half years; but such order is rare, and on the whole the Board has tempered its power under the Act with the economic realities confronting the employer. It has been feared by some that the definition of employee, which includes "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute," when connected with the definition of a labor dispute—"includes any controversy concerning terms, tenure, or conditions of employment . . . or association or representation of persons . . . regardless of whether the disputants stand in the proximate relation of employer and employee"—might mean that the Board would regard a strike as in existence until called off. This approach might make the employer liable for back pay for the whole period, and such sums could be tremendous. This possibility, however, should not cause undue fear, for although there is no statute of limitations,

<sup>15</sup> *Republic Steel* case, *supra*.

the Board does not permit this to militate against the employer unduly. And the courts stand ready, presumably, to review the Board's action and prevent abuse of discretion.

The period for which the Board grants back pay, in case of discriminatory discharge, is from the discharge date to the date of reinstatement offer by the employer. The same period is used if economic pressure or coercion has been used to force the employee to quit. The Board does not order back pay for strikers. The approach here is that the employee is responsible for his loss, although the striker will be qualified for back pay from the date he makes application for reinstatement to the date reinstatement is offered. By this approach, the Board hopes to reduce any encouragement strikers may have under the Act. The back pay is only for the period of enforced idleness brought on by the employer's violation; and it is not anticipated that the employee profit by the back pay since the order is remedial, not punitive. When one considers, however, that the Board takes such factors into account as the employer's good faith, the economic status of the employer, and the status of the industry, it becomes a difficult question as to just how far a back-pay order is or can be remedial without infringing upon the punitive category. Certainly in the event a case is settled and a compromise is reached by the Board and the employer on back pay, the back pay is more in the nature of a fine than it is a remedial payment to make whole the loss from the violation.

Difficult problems arise when determining just how much the back pay for the individual shall be. What are the rate and amount of payment? As nearly as possible the Board endeavors in a back-pay order to have the employer reimburse the employee to the amount he would have earned. This may mean, in the case of wage rates, that the wage rate at time of violation is used, with account taken of increases or decreases made since that time. In the case of piece wages, some average for a period prior to the violation is used. Any earnings made by the employee elsewhere are deducted, although this raises a difficult problem as to how to treat work relief received by the employee. At first, the Board permitted the employer to make no deductions for work relief or unemployment compensation. This seemed punitive to the Board, since total payments received by the employee exceeded his losses,

so the Board now orders deduction for work relief although it does not do so for strike benefits or unemployment compensation.<sup>16</sup> The details of deduction for work relief were disagreed upon by the courts until settled by the Supreme Court in November, 1940. In the *Republic Steel* case the Board had ordered that monies received by employees for work relief should be deducted and paid over by the employer to the governmental agencies which had supplied the funds for the work-relief projects. The company had urged that such order was beyond the jurisdiction of the Board, but the circuit court held that the order was within the discretionary power of the Board and not unreasonable. In the *Leviton Manufacturing* case,<sup>17</sup> in an opinion written by Judge L. Hand of the Second Circuit, the court had taken another view as to relief deductions. After approving deductions for monies received by the employees from other employers and pointing out that monies received by grant of dole or charity were excluded since the Board deduction referred only to "work performed," Judge Hand argued that in contemplation work relief was opposite charity, that employees performed work of a value equal to what they received, and there was no reason why the company should subvene the public treasury any more than if the project had been the venture of a private capitalist. Since the employee gave as much as he got, the burden of improvement would be transferred to the employer from the public, which would thereby profit; and this would render the measure punitive. Therefore, concluded Judge Hand, that part of the order requiring the employer to pay over the amounts deducted for work relief to the governmental agency was not valid.

The Ninth Circuit Court of Appeals joined Judge Hand when, in the *Tovrea Packing Co.* case, it refused to enforce that portion of a Board order requiring the employer to pay over relief deductions to the governmental agency.<sup>18</sup> Because of the conflict of the *Leviton* and *Tovrea* cases with the *Republic Steel* case, the

<sup>16</sup> The Board, in a dictum in *Matter of Pennsylvania Furnace Co.*, 13 N.L.R.B. 7, took the approach that unemployment compensation is comparable to "home relief" rather than "work relief," and no deductions from back pay are to be allowed employers for sums received by the employees. Social Security taxes are not deductible since the Commissioner of Internal Revenue has ruled that back pay is not "wages" and is, therefore, not taxable.

<sup>17</sup> N.L.R.B. v. *Leviton Mfg. Co.*, 111 F. (2d) 619, CCA-2.

<sup>18</sup> N.L.R.B. v. *Tovrea Packing Co.*, 111 F. (2d) 626, CCA-9.

Supreme Court granted certiorari to determine whether the Board had power to require the employer to make the described payments to the governmental agency.

The Supreme Court in *Republic Steel Corp. v. N.L.R.B.* and *S.W.O.C.*<sup>19</sup> held that the Board did not possess the power to order the company to pay relief deductions to the governmental agency; and the court urged that the Board's power to command affirmative action was limited to remedial, not punitive, measures. The Board thereupon abandoned its rule that relief deductions be paid over to the work-relief agency, and orders now require only that work-relief earnings shall be deducted from the back pay due the employees.<sup>20</sup>

## 2. Posting of Notices

No specific power other than the power "to effectuate the policies" exists for the Board to order notices posted. The power was upheld early by the Supreme Court, however, in the *Greyhound* case,<sup>21</sup> although a debate engrossed the circuit courts of appeal as to the form of notice required by some of the Board's orders. The *Greyhound* case upheld the power of the Board to require that notices be posted where a company union has been found by the Board and the Board has ordered withdrawal of recognition. The notice states that the employer has withdrawn recognition of the company union and that he has completely disestablished the company union as representative of the employees.

Standard on Board orders until April 18, 1940, was the requirement that the employer post a notice that he "will cease and desist in the manner aforesaid. . . ." "the manner aforesaid" referring to the preceding portions of the order. Since the negative portion of an order precedes the affirmative portion and since the negative portion included the comprehensive cease and desist order, the employer might be promising to cease doing things he had never done; and in any event he would be forced to confess that he had been guilty of an unfair labor practice. The reason for the case was, of course, that he denied guilt, yet the implication of a broad "cease and desist" prohibition was that he had been doing

<sup>19</sup> Decision rendered Nov. 12, 1940. The source here is N.L.R.B. Press Release J-397, which quotes the decision of the Supreme Court.

<sup>20</sup> N.L.R.B. Press Release R-3820.

<sup>21</sup> *N.L.R.B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 (1938).

that which the order demanded that he stop. Since in the law there is a tradition that an admission of guilt may not be forced even though a public official claims that one be guilty, the courts argued as to the validity of that portion of the Board's order. Eventually the point reached the Supreme Court, which found a decision unnecessary but which would have held against the Board had Board action not made Court action unnecessary. The Board, however, on April 18, 1940, had itself changed the form of notice requirement.<sup>22</sup> Whereas the Board formerly required the notice to state that the employer "will cease and desist in the manner aforesaid. . . ." the new form requires that the employer shall state that he "will not engage in the conduct from which he is ordered to cease and desist." The Court added the words, "as aforesaid," following "desist" in the new order form, so as to subscribe, probably, to its criticism of the "In any manner" portion of the Board order.<sup>23</sup>

### 3. Disestablishment

Whenever the Board finds a company union, the usual order is one requiring the employer to disestablish the union and to post notices that he will not recognize the union for bargaining purposes and that he has disestablished it. This remedy, according to Chairman Madden, was an invention of the Board, and one which has become conventional despite the Act's making no mention of such remedy.<sup>24</sup> The circuit courts regularly have upheld the remedy, as has the Supreme Court.<sup>25</sup>

It will be recalled that it is made an unfair labor practice for an

<sup>22</sup> In *Matter of Brown Shoe Co., Inc.*, 22 N.L.R.B., No. 93.

<sup>23</sup> N.L.R.B. v. Express Publishing Co., 312 U. S. 426 (1941). The Court approved the Board's changed order form by modifying an earlier order so as to correspond with the Board's revised notice requirements. In several preceding cases the Court had seemed to approve the original Board order form through *sub silentio* holdings.

<sup>24</sup> Smith Hearings, Vol. II, No. 15, p. 617. The Chairman apparently meant the Board invented the remedy only as it pertained to Board cases. The foundation for such "invention" was the *T. & N.O.* case, where the Federal district court had ordered the carrier to remedy an injunction decree by disestablishing the company-sponsored association. The Supreme Court upheld completely the ruling of the district court, and thus a model was provided for the N.L.R.B. See *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548 (1930).

<sup>25</sup> N.L.R.B. v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261 (1938); N.L.R.B. v. Pacific Greyhound Lines, Inc., 303 U. S. 272 (1938); N.L.R.B. v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939); N.L.R.B. v. The Falk Corp., 308 U. S. 453 (1940).

employer "to dominate or interfere with the formation or administration of any labor organization . . ." Therefore, any company union which is under the domination of the employer will, if a charge is filed, be dispensed with through the complaint stating a violation of the company-domination proscription and an order to disestablish. But the affiliate of a nationally organized labor union may be in collusion with the employer to the detriment of another organization. This would be in violation of the law. For example, the AF of L affiliate might be in collusion with an employer for a closed-shop contract and thereby help the affiliate. In such event the Board would insist that the employer cease such acts as operate to encourage the AF of L affiliate. This order would follow a charge of interference, restraint, or coercion; and a charge of company domination would not be used. The latter charge is never used for an affiliate of a national organization but is used only for an independent and unaffiliated union. This difference in the charge brought hinges upon the historical background of the two leading labor organizations, for neither would tolerate a charge that it was "company-dominated." The difference in the charge, therefore, brings a difference in the order issued by the Board.

A company-dominated union found by the Board will bring an order that the employer withdraw recognition, and the order will also require that the union be disestablished by the employer. If any contract exists, the order also will require the employer to cease giving effect to the contract. If a national organization's affiliate has been found to be in collusion with the employer and a contract exists, the Board will order the employer to cease giving effect to the contract and/or to cease recognizing the union; but there is no order of disestablishment. In a sense, then, the Board in each case tells the employer he must cease the violation; but the real distinction goes further.

When an affiliate of a national organization is involved and the order requires the employer to give no effect to the contract and/or to cease recognizing the union, it will add a provision to the effect that the employer will not bargain with the affiliate "unless and until" the effects of the interference have faded away and the affiliate is a bona fide representative of the employees. But when company domination is found in the case of the un-

affiliated union, the Board approach is that such organization can not possibly purge itself clean of the employer interference and, therefore, the only certain recourse in order to assure independence for the employees is an order requiring disestablishment of the union. While actually at the origin of the two types of orders the effects appear to be similar, the passage of time will obliterate the "invalidation" of the employer's contract with the national affiliate, which might be said to be "quasi-disestablished" by the Board order. Thus the real distinction is that an order requiring the employer to disestablish a union means that never again can the same union represent the employees, while a national affiliate, even though guilty of working with the employer—that is, the employer "interferes"—can again be the representative of the employees when it proves to the Board that it is "clean."

This distinction has been upheld by the Supreme Court in the *Newport News* case.<sup>26</sup> In that case there had been a company union, referred to as a "Plan," prior to passage of the Act; after passage of the Act the "Plan" was succeeded by an unaffiliated union under some company control. Even if there had been no company control, held the court, the disestablish order would stand because the employees at large had not been informed that the company was indifferent as to whether the employees joined the new union, and where a new organization evolves out of a preceding one that was company-dominated, the Board may assume, in the absence of clear proof to the contrary, that the employees will suppose the new organization has company support and will thereby not have freedom of choice as contemplated in the Act.

Despite the charge that the Board "liquidates" AF of L unions and "invalidates" AF of L contracts, the Board technically does not itself disestablish any union, company, or affiliate. The order always runs against the employer, although the effect may be to "quasi-disestablish" an AF of L affiliate. Certainly the Board invalidates contracts of all unions, AF of L included. The Board, of course, can not disestablish any union; and a company union may continue to live despite the Board's order and the employer's action to disestablish it. Few company unions, however, do exist,

<sup>26</sup> *N.L.R.B. v. Newport News Shipbuilding and Dry Dock Co.*, 308 U. S. 241 (1939).

for the Board action which follows a Board order renders it almost an impossibility for the company union to persist. When an election is held at the plant where the company union was ordered disestablished, the Board refuses the union a place on the ballot; and this refusal adds to the real distinction that exists between orders issued where company unions are involved and those issued where national affiliates are involved. Thus, the disestablish order makes no provision for the unaffiliated union ever to be a representative, while the order applicable to the national affiliate does make such a provision. This approach has been upheld by the Supreme Court in the *Falk* case,<sup>27</sup> where the circuit court of appeals, contrary to the Board's direction, had attempted to restore the independent union to the ballot. The Supreme Court not only held that the circuit court was without anticipatory judicial control of election methods since the statute vests no power in the courts for review or supervision of election methods, but also the Court supported Board findings that the company domination had been so pervasive that the company union could not represent the employees:

"From these findings the Board justifiably drew the inference that this company-created union could not emancipate itself from habitual subservience of its creator, and that in order to insure employees that complete freedom of choice guaranteed by Section 7, Independent must be completely disestablished and kept off the ballot."

As of January, 1940, there had been no case where there was a charge, and a Board finding, that a CIO union had received assistance from the employer; but there were twelve cases where the complaint charged, and the Board found, that the AF of L affiliate had received assistance from the employer. It was on these twelve cases that the AF of L based its protests that the Board "invalidated" its contracts and was partial to the CIO. The statistical picture may be given of the Board's record as between the two organizations and the independents.<sup>28</sup>

<sup>27</sup> N.L.R.B. v. *The Falk Corp.*, 308 U. S. 453 (1940).

<sup>28</sup> In one case the Board entered an order based on a stipulation agreed to by the Board, the employer, and the affiliates of the AF of L and CIO, ordering the employer to cease and desist from giving effect to or in any manner enforcing or recognizing closed-shop contracts between the employer and the CIO affiliate, and ordering the company to bargain with the AF of L affiliate. Smith Hearings,

I.	Orders to Disestablish Issued by Board against	
(a)	Unaffiliated unions	247
(b)	AF of L unions	0
(c)	CIO unions	0
II.	Orders to Cease and Desist Recognition of	
(a)	Unaffiliated unions	0
(b)	AF of L unions	12
(c)	CIO unions	0
III.	Allegations of Violation of Company Domination Dismissed with Respect to	
(a)	Unaffiliated unions	52
(b)	AF of L unions	3
(c)	CIO unions	0

#### D. Court Control of Board Orders

The mildness of the sanctions applicable under the statute has been indicated. Likewise it has been pointed out that the orders are not self-enforcing: If an employer refuses to obey a Board order, the Board must go into the circuit court of appeals to get enforcement; or the employer may go into the court and ask that the order be set aside, in which case the Board at the same time will enter and ask that the order be enforced.<sup>29</sup> The case must be briefed and argued; and the Court may enforce, in whole or in part, or set aside the order. The judgment and decree of the circuit court are reviewable upon writ of certiorari by the Supreme Court. The circuit court has the power to require the Board to take additional evidence and to transmit it to the court with the Board's additional findings and recommendations for modification of its original order. The court may find that there was not substantial evidence to support the findings and order, or it may set aside the order on the grounds that the trial examiner excluded evidence erroneously at the hearing or on the grounds that procedural errors occurred. Moreover, the courts always stand ready to review the order and examine it to ascertain whether it is arbitrary, unreasonable, or capricious; and the Board's record is excellent in this respect. There have been, however, minor changes

Vol. II, No. 6, pp. 199-201. The statistics cover the first eighteen volumes of decisions, or to early 1940.

<sup>29</sup> See Appendix I, Sections 10(e) and (f).

made by the courts in many Board orders. But the attitude of the courts and the frame of reference for the Board were well stated by the Supreme Court in the *Consolidated Edison* case:

"... We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

"The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act."<sup>30</sup>

It is evident that the provisions of the statute, as carried out in practice by the Board, have been reasonable; but it is also evident that great discretion rests with the Board, and the power of the Board to issue orders against employers is stated in sufficiently broad language as to render the presence of the courts comfortable. The history of the Board demonstrates a reasonable approach as to what may constitute remedial orders; nevertheless, the courts still guard against the Board's possible exercise of "unfettered discretion." This was shown in the *Phelps Dodge* decision<sup>31</sup> in the Supreme Court. The Court very emphatically affirmed the wide discretionary authority given the Board by the Congress to remedy violations so as to effectuate the policies of the Act. Too, the Court emphasized the limited judicial review provided by the legislation. But, said the Court, the basis of the order issued by the Board must be disclosed, thereby giving evidence that it has exercised the discretion empowered it by the Congress. Clarity in the exercise of the administrative process would be the best vindication of that process.

<sup>30</sup> *Consolidated Edison Co. of N. Y. v. N.L.R.B.*, 305 U. S. 197 (1938).

<sup>31</sup> *Phelps Dodge Corp. v. N.L.R.B.*, 85 L. Ed. 753 (Adv. Ops.) (1941).

## Chapter VI. PROSCRIPTIONS AND PROBLEMS

Extremely difficult problems arise out of the attempt by the legislative branch of the Federal government to detail how the right to organize shall be protected, and these problems go to the very heart of the whole field of employer-employee relations. These problems have their origin in the Act as written, in its interpretation, in its failure to deal with certain pertinent issues other than the ones dealt with, and in the whole history of the American labor movement. The sincere employer who desires to improve management-labor relations; the employer who prides himself on individualism and resents any agency or organization's hedging his activity no matter the social cost; the dual labor movement, which results in each major organization's demanding that the law operate to its own benefit; the lawyers and employers who refuse to understand the Act and insist that it should incorporate a multitude of other proposals dealing with labor relations—all these sources are reflected in the problems which exist or have arisen in conjunction with the unfair labor practices proscriptions.

### A. Coercion and "One-sidedness"

Employer groups and employer associations have urged that the Act should be amended so as to prevent coercion not only from the employer but also from any source. What is meant is that employees and unions should not be permitted to exercise coercion in order to drive other workers into the union. Is this attitude a desire by the employer for "fairness," or is it an indirect method of fighting union membership?

It is fair to say that unions definitely do exert coercion against

workers.<sup>1</sup> In this respect they operate as do many other social institutions, such as corporations, or employers' associations. The coercion is usually regarded as legal so long as it does not violate certain social standards against such activity as violence, threats, or fraud.

The employer argues that the Act prohibits the use of coercion on his part against employees, the unions are not prohibited in their use of coercion; therefore, he concludes, the law is "one-sided." Also contributing to the "one-sidedness" argument, and in some instances a very real issue, is the employer's protest that in effect the Act forces him to sign an agreement with an irresponsible union from which he has no recourse if the union violates the agreement.<sup>2</sup> This argument, however right, really refers to contractual relationships between employers and employees and would exist quite apart from the Wagner Act.

One of Senator Wagner's favorite answers to the coercion argument was that state and local laws were and are available to prevent coercive action. This is true. But it is also true that such laws in fact seldom are, or can be, invoked, because of the tactics used by unions to increase their membership strength. The Wagner Act does not endow the worker or the union with any special privilege not found in the common law; but enforcement of the right to organize and bargain was always in the same category as is the prohibition of coercive measures. The fact is, despite Senator Wagner's argument and the irrelevancy of the employers' worrying about employees' being coerced by unions, that workers do not have complete and effective protection of their rights. Indeed, one can question whether the purpose of the Act was primarily to protect the employee's right to organize or whether it was to promote collective bargaining through promoting union organization. The answer may well be made out to be the latter,

<sup>1</sup> For example: "It is the desire to have nonunion workmen join the organization voluntarily; however, you are possibly familiar with the fact that in a few instances where the workers have been obstinate, other methods have been used. Several of these companies are now 100% organized." Quoted from a letter of a CIO affiliate inserted in the record in H. Hearings on N.L.R.A., Vol. I, p. 140.

<sup>2</sup> There is no evidence that unions are more likely to violate agreements than are employers. In the railroad field, the function of the National Railroad Adjustment Board is to resolve misapplication of agreements (secondary disputes). The majority of decisions are against the employer, although this fact is not conclusive evidence. See the testimony of William Leiserson in S. Hearings on N.L.R.A., Part 5, pp. 921-922.

more by force of circumstances than by congressional deliberation and logic. For while the law does protect the right of the worker to organize, it does not protect the right of the worker *not* to organize. This was recognized during hearings on the bill, and an attempt was made to amend the Act so as to protect the right of the worker not to organize; but the amendment was defeated.<sup>3</sup>

The same problem had been presented before in other legislation.<sup>4</sup> If the issue is freedom for the individual, then "to join or not to join" is important, for the alternatives are either to make certain that each individual's rights are protected or to sacrifice the individual's rights in favor of collective bargaining promoted through the growth of union organizations. This choice is necessary because it is recognized that all manner of union action has been frowned upon by the courts as injunctively coercive; hence to protect the individual against coercion from any source might put the unions in a "legal straightjacket." The same result might follow an attempt to protect the worker's right "to join or not to join." Yet it is the failure to protect against coercion or to protect the right "to join or not to join" that gives a basis for the employers' belief that the Government partially is promoting union organization. Although it appears that the Act and its proponents are concerned with the worker's freedom—and all proponents have insisted throughout that the worker must have freedom and be protected from coercion—in fact, the Act only removes the coercion by the employer, and reliance is placed on the rough-and-ready legal recourse of old for the protection of the individual against the union.

The Act as passed was meant really to apply only against the employer and to remove the evil of economic coercion. Of course the Act is one-sided, as indeed are many laws which are passed to enforce a public policy. There are no arbitrable provisions in the Act; there is not created an impartial tribunal to which go all

<sup>3</sup> See S. Hearings on S. 1958, 74th Congress, 1st Session, Parts I to III, and Congressional Record, 74th Congress, 1st Session, pp. 7650-7661, 7668-7675.

<sup>4</sup> Namely, the Norris-La Guardia Act, Section 7(a) of the N.I.R.A., and the 1934 Amendments to the Railway Labor Act. The Norris-La Guardia Act in Section 2 includes the phrase: ". . . though he should be free to decline to associate with his fellows." The Railway Act amendments simply prohibit either party to the employment relation from influencing the other in choice of representatives. It may be recalled that when Section 7(a) of N.I.R.A. was before the Senate Committee, it originally would have protected the right "to join or not to join."

labor-management problems; the Board is primarily an enforcement agency to compel the employer to subscribe to a stated public policy. This is not to say that unions should not live up to their agreements, that they should not forego coercion, or that even the right to strike might not need to be curtailed. It is to emphasize that the issue of unfair labor practices by an employer is constantly confused by the introduction of other issues that may need legislative attention but which are not properly concerned with the prohibition of certain employer practices found by the legislature to be of the order meriting condemnation.

Yet it is precisely out of the confusion of issues that come proposals to amend the Act in order to "equalize" and make the Act "two-sided." Apart from the fact that many employers desire to hamper unions and union organization by proposed amendments, and recognizing that present penalties for coercion are ineffective and do not provide the individual worker with realistic protection, and cognizant that laws seldom can be brought to bear against unions, how could the law be changed in order to "equalize" it, or to make it "two-sided"?

Strictly speaking, to make the Act "two-sided" for purposes of collective bargaining, the Act should follow the railroad legislation and prohibit any employee from interfering with an employer in the selection of representatives for bargaining. But that is a sterile sort of suggestion for, as observation indicates, there has been no experience on the railroads or elsewhere to indicate that the employer ever needs the kind of "protection" the Wagner Act affords employees.

The "protection" employers desire goes further, as is indicated by other proposals. One such proposal is to render the benefits of the Act unavailable to the employee or the union if their tactics violate any laws. Apart from action the courts might interpret as illegal, such an amendment would also require another change in the law in order to make it "two-sided": Not only should the benefits be made unavailable to unions and employees acting illegally, but also there should be a provision that, if the employer violates the Act, the employees need not submit to legal restrictions in their tactics. Obviously this type of "equalizing" is not desirable. Even without the latter provision it would be erroneous to permit the employer to use the illegal acts of workers and em-

ployees as a defense against the enforcement of public policy, for this would in effect be justifying one wrong by another wrong. To permit such a defense would deprive all workers in a plant of their right to collective bargaining if one worker, or a union business agent, committed an illegal act. Too, such an approach would run counter to the spirit of the Norris-La Guardia Act, which narrows the responsibility to be borne by union members. The alternative would be to develop some means whereby the employer's obligation to bargain collectively could be divided up, and this would be a contradiction which would restate the whole problem of collective bargaining. If the Act were amended in this fashion in order to make it "two-sided," such a defense for the employer might encourage the most reprehensible tactics by both employer and employees; and thereby the problem would be aggravated.

Another proposal would simply have the Board investigate alleged unfair practices by employees and unions and issue cease and desist orders. The practicability of this course is questionable too, though less so than other proposals. Aside from the argument of the Board that such an amendment would turn the Board into a Federal police court, which would have to devote all of its time to investigating and defining worker conduct to the exclusion of the basic purposes of the Act (collective bargaining), could "cease and desist" procedure be used?<sup>5</sup> Probably not, for such a procedure would entail hearings, review, and perhaps court action to enforce the order. This would not be practicable.

Despite the "fairness" argument, the conclusion must be reached that the Act is well drawn in that it prohibits employer actions and charges the Board with only the responsibility of ascertaining whether the employer committed unfair labor practices. The problems generated may call for a whole review of labor-management relations, or they may demand an extension of conciliation, mediation, and arbitration; but it is clear that the Act should apply only to employers. It is equally clear that the prob-

<sup>5</sup> The Board now inquires into employee conduct in investigating unfair labor practices and representation disputes. It is pertinent to point out that such a defense by the Board is contrary to its *raison d'être*, namely, expertness and dispatch via the administrative agency. The courts offer practically no protection to the worker. There is logically as much reason for an administrative agency to protect a worker from a union as from an employer.

lem remaining is not to determine whether an individual's rights are to be protected from all infringements, for it is agreed that the individual should be protected from all coercion. The problem is implementation of a policy of complete and effective protection.<sup>6</sup>

### B. Interference

The prohibition of interference by the employer has brought more criticisms than problems. Such criticisms came because Board interpretations handicapped employers in influencing the choice of representatives and because of the AF of L. The AF of L's pressure to enact the law, and its endorsement of the law's provisions, came prior to the split in the labor movement; hence the AF of L criticism is in part the vociferous fight by the AF of L to protect its position in the labor movement.

The AF of L does not desire the Board to have power to invalidate contracts. The Board has consistently done so where it has found collusion between the employer and the labor organization, employer encouragement of any organization, or where an organization obtains a closed-shop contract without having a majority of the employees designate that organization as their representative. Both AF of L and CIO election victories have been set aside by the Board where the Board has found that there was interference with the employees' choice. The AF of L has argued that it was never intended that there should not be discussion between the employer and employee on labor questions or that the employer should not be permitted to indicate his preferences as between two unions. Testimony before the House Committee when it was considering the proposed amendments to the Act in 1939 indicates that the AF of L regards itself as the choice of employers. If employers do prefer the AF of L unions—and it would not be surprising in light of the traditional relationship between the AF of L and employers—then it is readily understandable why the AF of L would insist that the employer be permitted to state his preference. The fact remains, however, that if economic coercion, subtle but powerful, was a valid reason for passage of the Act—as the AF of L argued at the time of passage—then there is a valid

<sup>6</sup> The reader is urged, in this connection, to see Chapter XXIII(A) for material on state legislation.

reason for preventing the employer from stating his preferences, for it is the worker, not the employer, who must exercise the organization and bargaining rights guaranteed by the Act. Nevertheless, the AF of L's position has been that the employer should be free to persuade employees in favor of a bona fide—*i.e.*, not company-dominated—organization.

Apart from the issue of free speech, it is difficult to oppose the Board's position or to take issue with the Act. If license is given to an employer to sign contracts by collusion, the spirit of the Act surely is not fulfilled; and the persuasive methods used by an employer can be very subtle. Every contract invalidated by the Board has been the result of employer practices which led the Board to believe and find that the employee's freedom of choice was infringed. The AF of L's position that employer favoritism toward national organizations be not disapproved by the Board can not be sustained. Interference is reprehensible whether it relates to a company union or the affiliate of a national organization, since in either situation the employee is deprived of free choice. National organizations have no inherent qualities that permit them to use the cudgel of employer favoritism. Moreover, if rival national organizations' affiliates were to compete for an employer's preference, it might lead to more use of economic methods and weapons and would thus be a departure from the reasonable settlement of representation questions which the Act contemplates.

It may also be pointed out and stressed that a mere statement of employer preference has never been held a violation of the Act. The Board has taken the position that the employer may express a preference for one organization over another if he does not also engage in acts which would militate against one organization. In every case where the Board has found it necessary to invalidate a contract, there was more than an innocent employer-expression of favoritism or mere preference. In addition, there were acts by the employer such as might constitute duress and a violation of the law.

The AF of L has also had elections set aside, and this has irked that organization for the reason that its competitive position with the CIO has depended to some degree upon the ballot box. Elections have been set aside and new ones ordered where re-

marks by supervisory employees are judged by the Board to have been instrumental in determining the employees' vote, for the Board has held that the employer is responsible for the remarks of his supervisors. Sometimes, too, supervisors and foremen have not been permitted by the Board to vote at the election on the grounds that such employees are disqualified because of their position; but this decision rests upon the facts in each case. It may appear unjust to hold the employer responsible for the remarks of supervisors, but the Board has found that the remarks of supervisors may easily become threats.<sup>7</sup>

In summary, then, it appears that the "interference" proscribed by the Act should not be permitted if the Act is to be retained. The Board alone should interpret what constitutes "interference" in order to prevent such practices as espionage. It is true that the power and scope of action given to the Board are broadened by the use of such terminology; but "interference" is analogous to the interpretation of the railroad legislation which, indeed, uses the still broader term "influence."

### C. Free Speech and Free Press

It is through the Board's "interference" doctrines that free speech and free press are supposedly endangered. The AF of L and the *Ford* case<sup>8</sup> have been the leading factors in the free-speech controversy, while Board proceedings against the Weirton Steel Co. were the basis of the free-press campaign.

As is well known, the right of free speech is not an absolute right but a right limited by the dictates of circumstances. An expression of opinion unsullied by concomitant unfair and coercive acts by the employer has never been held by the Board to be a violation of the law. The Board is not interested in free speech as such; but always the issue is whether, with evidence of coercive

<sup>7</sup>"The employer, however, may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of *respondeat superior*. We are dealing here not with private rights . . . nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants, but with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence . . ." From the decision of the Supreme Court in *International Ass'n. of Machinists v. N.L.R.B.*, decided Nov. 12, 1940. N.L.R.B. Press Release J-395.

<sup>8</sup>*Matter of Ford Motor Co.*, 14 N.L.R.B. No. 28, decided Aug. 9, 1939.

acts by the employer, there is interference, restraint, or coercion. In the *Ford* case, where the employer had a record of coercive acts, the Board was plainly disturbed by the likelihood that its finding and order would be the signal for a "free-speech" campaign, so it went to some lengths to point out its position:<sup>9</sup>

"The respondent contends that the foregoing publications constitute no more than 'an expression of opinion upon the part of the employer addressed to his employees.' Although counsel for the respondent at the oral argument stated that the purpose of distributing the 'Viewpoint of Labor' 'was unquestionably to put before the employees the views that Mr. Ford entertained as to where the best interests of the employees lay,' with 'whatever effect it might have upon the minds of the employees,' the respondent claims that, since the Congress 'deliberately refrained from extending its prohibitions to acts on the part of the employer calculated to "influence" employees,' the Act does not proscribe such expressions of opinion. The respondent further contends that, if the Act be interpreted to authorize the proscription of such publications as are here involved then, to that extent, the Act is unconstitutional as an abridgement of the freedom of speech and of the press in violation of the First Amendment of the Constitution of the United States.

". . . The issue here is whether, under the circumstances of this case, the respondent interfered with, restrained, and coerced its employees in the exercise of their rights of self-organization by distributing to its employees literature criticizing and disparaging labor organizations.

"The publications must be considered in their context. Coming at a time when the U.A.W. was conducting a drive to organize the respondent's employees, the publications had the unmistakable purpose and effect of warning employees that they should refrain from joining the union. We find it impossible to believe that statements denouncing labor organizations, characterizing union leaders as insincere and racketeering persons who seek only to levy tribute upon workers, and warning employees that by joining a labor organization they pay money for nothing, coming from the employer and distributed to employees under circumstances clearly indicating that they should take heed, are merely 'directed to the reason of the employee' and are 'intended to influence only his mental process,' and have no intimidatory or coercive effect. No employee could fail to understand that if he disregarded the warning he might find himself in difficulties with his employer. . . .

<sup>9</sup> *Ibid.*

"We find that the respondent, by distributing the above-mentioned literature to its employees, interfered with, restrained, and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act.

"We do not believe that the foregoing finding unconstitutionally abridges the respondent's freedom of speech and of the press. Freedom of speech is a qualified, not an absolute right. The Act requires the employer to refrain from acts that interfere with, restrain, or coerce employees in the exercise of their rights. . . . The guarantee of such rights to the employees would indeed be wholly ineffective if the employer, under the guise of exercising his constitutional right of free speech, were free to coerce them into refraining from exercising the rights vouchsafed them in the Act. The contention that coercive statements made by supervisory officials to employees are protected by the First Amendment has been rejected in several cases. . . . We think the principle thus established is no less applicable to the circulation of literature having a like coercive effect."

The Board order, among other prohibitions, read:

"[Cease and desist from] interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act by circulating, distributing or otherwise disseminating among its employees statements or propaganda which disparages or criticizes labor organizations or which advises its employees not to join such organizations; . . ."

Probably in such cases as that here considered, the significant question is whether the Board order means that the employer must cease and desist from disseminating his statements only insofar as they themselves, or in their context, are coercive or whether the employer must desist from any and all expressions which might be regarded as hostile to unions, even if unaccompanied by coercive acts such as discriminatory discharge or violence. The difficulty in "free-speech" cases of determining whether the statements are directly coercive or only indirectly coercive when considered against the surrounding circumstances places a burden not only upon the employer and the Board to approach this problem with great caution, but also upon the courts. Despite the intensity with which it may be argued that it is none of the employer's affair whom the employees choose as their bargaining representative, the employer surely does have a right to his preferences as to labor

organizations. Moreover, the right of any person to form opinions and express his views upon controversial subjects has venerable sanction in the courts and in tradition. Congress never meant, through a governmental agency, to deprive any individual of his traditional rights; rather, Congress hoped to expand the reality of those rights.<sup>10</sup> The Board thus far has been cautious with the "free-speech" issue, but the nature of the issue brings difficult legal problems if the rights of all are to be protected.<sup>11</sup>

Free press has seldom been an actual issue. H. W. Barclay, Editor of *Mill and Factory*, published a highly critical article of the National Labor Relations Board while the Weirton Steel Company was involved in a case before the Board. Board Chairman Madden thereupon issued a subpoena which required Mr. Barclay to appear before the trial examiner and testify. In addition, the subpoena required the production, in essence, of all instruments of information, records, memoranda, and statistics forming the basis of Barclay's article.<sup>12</sup> The Board, claimed Mr. Madden, desired to ascertain whether there was evidence that the employer had participated in the printing of the article, not because the article was condemnatory of the Board but to ascertain whether

<sup>10</sup> During hearings on the bill Senator Walsh, Chairman of the Committee, said: "I do not think there is anything in the bill to prevent an employer when his employees, the men and women are about to organize, from posting a notice, or writing each an individual letter, or personally stating to each that he thinks their best interest is to form a company union, that is violently opposed to so-and-so who is attempting to organize a union. I do not understand there is anything in the bill to prevent an employer from doing that, and that is why we struck out the word 'influence.' That would be influence, and not interference." S. Hearings on S. 1958, 74th Congress, 1st Session, Part III, pp. 304-305.

<sup>11</sup> Regional directors often dismiss or have charges withdrawn that include expressions of employers. Thus, the Board actually does permit employers to render expressions of opinion without violating the law. See H. Hearings on N.L.R.A., Vol. II, pp. 161-165.

The First Amendment was argued in the *Fruehauf* case, 301 U.S. 49 (1937), but the Supreme Court made no mention of the subject in its decision. The *Associated Press* case, 301 U.S. 103 (1937), was not a direct holding on free speech here discussed, although the First Amendment was involved. The Court there held that limitation of the right of discharge of an editorial employee was not an unconstitutional regulation of editorial policy.

The Circuit Court of Appeals for the Sixth Circuit, in a decision on October 8, 1940, held in the *Ford* case (*N.L.R.B. v. Ford Motor Co.*, 114 F. (2d) 905) that the findings of the Board, which declared Ford publications and their distribution to be "in pursuance of unfair labor practices," must be set aside and that portion of the order pertaining thereto denied enforcement.

<sup>12</sup> Hearings Before a Subcommittee of the Committee on the Judiciary, U.S. Senate, 75th Congress, 3rd Session, pp. 26-29, 40, 65-66.

the respondent was using this method of fighting the union. Let it be said that the Board, from experience, knew that employers sometimes used such tactics. This Board action gave rise to much publicity; and when Mr. Barclay refused to appear, the Board did not enforce its subpoena. There is no evidence of Board action as a result of condemnatory material in such media as newspapers and magazines, and there has been no lack of opportunity.

#### D. The Closed-shop Issue

There have been two sources of complaint on the closed-shop provisions of the Act: The employer groups, and the AF of L. The Act provides that a closed-shop contract may be concluded only when the organization has a majority of employees. This provision does not change the legal aspects of the closed-shop in any jurisdiction; but with the qualification necessitating a majority it does increase the burden for unions, since prior to the passage of the Act a union could sometimes obtain a closed-shop when only a minority of the workers were members.<sup>13</sup> This situation adds to the AF of L opposition. On the basis of employer preference, the AF of L has argued against that provision of the Act.

The opposition brought by employers against the closed-shop provision is based ostensibly in ethics. While they are willing to grant that the provision leaves the legality of the closed-shop unchanged, they are fearful lest the spur given to unionization will mean in reality that more closed-shop contracts will be demanded. One may suppose that the fear of more contracts is not unrelated to demands for changes in wages, hours, and working conditions. In all likelihood, this fear impelled employers to demand that the Act protect the right "to join or not to join" and thereby prevent the saddling of the closed-shop on all industry.

Without arguing the merits of the closed-shop, this is clear: The closed-shop proviso of the Act is disadvantageous to the non-union man. The union may be closed, and this would injure the individual. But even if the union were open, the individual

<sup>13</sup> Probably in most instances the closed-shop issue is the issue of minorities' rights, but not always. A union may demand a closed-shop even if it has no members working for an employer. This was the situation in *Lauf v. E. G. Shinner and Co.*, 303 U.S. 323 (1938), where the union demanded that the employer force his employees to join and bargain through the union, and picketed his establishments to enforce its demands.

would have to choose between the union and the job, which is to say he would have no choice at all since, presumably, he would have joined the union had he so desired. It does not always follow, however, that the signing of a closed-shop contract destroys the individual's power to bargain with the employer—that may be unchanged. If he does not desire to join the union, he can quit; and that is exactly what he could do prior to a closed-shop. For when he bargained individually with the employer, he was forced, too, to quit if he had small individual strength and did not care to accept the employer's terms. Still, the right of the individual is involved here; and this is again evidence that the Act, which theoretically is to protect the individual, primarily keeps the focus on collective bargaining.

The proponents of the legislation may argue that the Act does nothing to affect the closed-shop issue. They may claim that the *status quo* on that issue was desired when the Act was passed. But the realities of the situation and of the closed-shop movement lead to the belief that the *status quo* will not be maintained, and again it appears that the Federal government and a Federal agency are responsible for partiality as between employers and employees. Moreover, since the Wagner Act makes for stronger unionism and therefore the closed-shop, it really runs contrary to the expressed public policy of a past that still affects current trends. The Railway Labor Act prohibits the closed-shop (and its corollary, the check-off); the N.I.R.A., although perhaps meant to permit the closed-shop, was never applied in a manner to promote the closed-shop, and the interpretations of the influential persons during the existence of the N.I.R.A. did not encourage the closed-shop; the Norris-La Guardia Act really opposes the closed-shop by stating that the worker should be free to decline to associate with his fellows; and the Anthracite Coal Strike Commission of 1902, the United States Commission on Industrial Relations of 1916, the United States War Labor Board, and the National Industrial Conference of 1919 all opposed the closed-shop principle.

The exclusion of the present closed-shop proviso of the Act would have rendered the closed-shop illegal (since a closed-shop would be discriminatory in favor of the union), and it is arguable that this might be sound national policy in that the plane of com-

petition would be raised. The employer might be more likely to look to the welfare of his workers than to defame the union, and he could no longer rely upon unfair labor practices to prevent the workers joining the union if they so desired. The union, too, would be more likely to look to its competitive front and its position in the public mind, so that one healthy result might well be an improvement in union leadership and tactics. In the face of such competition, unions might even reduce the exorbitant entrance fees to be found in some union areas. To abolish the closed-shop would mean losses, perhaps, for a comparatively few laborers in the union; but with employer activity proscribed by the Act, the more desirable benefits of trade unionism might become more prominent in the public mind, such as standardized working conditions, improved health and working conditions, and favorable dealings in wages and hours. As now, the employer upon request would have to bargain with the representatives of the majority, else individual bargaining might result and leave the individual helpless before the unrestricted economic power of the employer. Whether the Board should protect the worker is again the problem of how wide should be the scope of the Board's police function.

#### E. Discrimination Against a Potential Employee

The *Report on the Investigation of the National Labor Relations Board* states a problem that has been the source of much press criticism:

"During the course of the testimony of the members of the Board and its personnel, certain practices were brought out which apparently go beyond the language, scope, and intent of the Act.

"These practices consisted in the invention of 'remedies' not provided for by the Act. These 'remedies' will be discussed under the following headings:

"(1) 'Reinstatement' of Men Never Employés."<sup>14</sup>

To the press and the public it probably appears extremely unjust for the Board to require an employer to offer hire to and to pay men whom he never employed, yet in some cases the Board

<sup>14</sup> H. Report No. 1902, 76th Congress, 3rd Session, pp. 57-59.

has so ordered. The leading example in this category is probably the *Waumbec Mills* case.<sup>15</sup> Although one may disagree with the Board's interpretation, one can not disagree that the problem is acute and that it almost defies solution.

In the *Waumbec Mills* case the employer refused to hire two employees simply because of union activities in the past; and the men filed charges alleging discrimination, and interference, restraint, and coercion. The Board carefully considered the facts and found that the refusal to hire was based upon union activity. The Board then considered whether the broad remedial powers authorized in the Act limited the orders the Board could make or whether the pertinent phrase was only a suggestion. That is, did the phrase, "including reinstatement of employees with or without back pay," mean that the employer-employee relationship must be established; or was it only suggestive of broad Board power to remedy a violation?<sup>16</sup> The Board decided that the phrase was only a suggestion and that reinstatement with back pay was the order necessary to remedy that which existed—the blacklist. It is clear that the Act does confer upon the Board broad power to order remedies, and it is here clear that broad power is needed to meet such practices as the blacklist.

The proscription against interference, restraint, and coercion covers all other practices, so the question may be asked: Does the proscription against discrimination cover the blacklist? The Section forbids an employer "by discrimination in regard to *hire* or tenure or employment or *any term or condition of employment* to encourage or discourage membership in any labor organization. . . ."<sup>17</sup> The Board argued that there is no ambiguity in the language and that its position is supported by congressional intent.

The House Committee in its report wrote:

"The third unfair labor practice prohibits an employer in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization. This spells out in greater detail the provisions of section 7(a) prohibiting "yellow-dog" contracts and interference with self-organization.

<sup>15</sup> N.L.R.B. Case No. C-715.

<sup>16</sup> See Appendix I, Section 10(c).

<sup>17</sup> See Appendix I, Section 8(3). Italics supplied. Credit for the development of the argument here is due the *Brief for the N.L.R.B., In the U.S. CCA (1st) October Term, 1939, N.L.R.B. v. Waumbec Mills, Inc.*

This interference may be present in a variety of situations in this connection, such as discrimination in discharge, lay-off, demotion, or transfer, *hire*, forced resignation, or division of work; in reinstatement or hire following a technical change in corporate structure, a strike, lock-out, temporary lay-off, or a transfer of the plant.”<sup>18</sup>

With regard to discrimination, the Senate Report read:

“. . . If the right to be free from employer interference in self-organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work.”<sup>19</sup>

Senator Walsh, Chairman of the Senate Committee, stated on the floor of the Senate:

“All this bill says is that *no employer may discriminate in hiring* a man, whether he belongs to a union or not, and without regard to what union he belongs; but if an employer wishes to agree and to make a contract of his own volition with his employees to hire only members of a company union or of a trade union, he can do so.”<sup>20</sup>

Congress thus intended to protect the worker at the hiring stage and twice prohibited discrimination: first, in regard to hire or tenure; and second, in any term or condition of employment in order to encourage or discourage membership or activity in a labor organization.<sup>21</sup>

If, argued the Board in the *Waumbec Mills* case, an employer can refuse to hire because of union activity, then this constitutes an open threat to union activity because it endangers future occupation and employment. To a Board whose task is to prevent employers from warring against unionism, the important factor is the effect of an employer’s practices; and the blacklist has the

<sup>18</sup> H. Report No. 1147, 74th Congress, 1st Session, p. 19. Italics supplied.

<sup>19</sup> S. Report No. 573, 74th Congress, 1st Session, p. 11.

<sup>20</sup> Congressional Record, 74th Congress, 1st Session, p. 7674. Italics supplied.

<sup>21</sup> It is pertinent to note that Section 7(a) of the N.I.R.A. meant to prohibit the use of the blacklist and would support the Board in the *Waumbec Mills* case. The language of 7(a) meant to apply before the employer-employee relationship existed, for that language read, “no one seeking employment.” And if N.I.R.A. grew out of N.R.A.—which it did—then it is reasonable to suppose that the Board was to have the power it has exercised against the blacklist.

same effect as a discharge because of union activity. Moreover, congressional intent was clear. The respondent took the position that the employer-employee relationship, which is mentioned in the preamble of the Act, must exist before the proscriptions of the Act could be invoked. This approach would make the blacklist valid under the Act, and the Board did not believe the Congress intended such a result. The principle of the Board was sustained by the circuit court of appeals.<sup>22</sup>

In the *National Casket* case the same issue was before another circuit court of appeals.<sup>23</sup> The majority of the court held in that case, however, that the employer may discriminate because of union activity or membership prior to the existence of the employer-employee relationship, but once that relationship exists no discrimination may be practiced. The Board argued for the consistency of its logic and approach: A discriminatory denial of employment to a *nonunion* man in order to *encourage* membership in a labor organization (or the discriminatory denial of employment to a member of one labor organization in order to encourage membership in another) was unlawful in the absence of closed-shop conditions permitted by the Act. Further, the Board pointed out that it had so held in several cases.<sup>24</sup> Chairman Madden testified that, if an employer attempted to discriminate against nonunion men (where no closed-shop contract existed) by hiring union men because they were union men and refusing employment to nonunion men because they were not union men, the Board would regard such practice as discrimination proscribed by the act.<sup>25</sup>

The conflicting interpretations of the circuit courts were resolved when the *Phelps Dodge* case was decided by the Supreme Court.<sup>26</sup> To the Court the dominating question was whether an employer, subject to the Act, could refuse to hire employees solely because of their union affiliation. Subsidiary questions, among them reinstatement, followed. The Court held that the legislative history, the text itself, and the industrial background per-

<sup>22</sup> *N.L.R.B. v. Waumbec Mills, Inc.*, 114 F. (2d) 226, CCA-1.

<sup>23</sup> *N.L.R.B. v. National Casket Co.*, 107 F. (2d) 992, CCA-2. Also see *Phelps Dodge Corp. v. N.L.R.B.*, 113 F. (2d) 202, CCA-2.

<sup>24</sup> See p. 34 of *N.L.R.B. Brief in N.L.R.B. v. Waumbec Mills, Inc.*, *supra*.

<sup>25</sup> Smith Hearings, Vol. II, No. 16, p. 649.

<sup>26</sup> *Phelps Dodge Corp. v. N.L.R.B.*, 85 L. Ed. 753 (Adv. Ops.) (1941).

mitted no mutilatory construction of the statute so that it would apply only to prevent discrimination once the employer-employee relationship had been established. The employer was still free to select or discharge his employees; the Act was only directed against the abuse of that right by interfering with the right of self-organization. The Court did not agree that the employer-employee relationship must be established before reinstatement but rather held that discrimination in hiring is twin to discrimination in firing and could be remedied by restoration of a man to employment. The use of reinstatement as a remedy also meant back pay to make whole the loss suffered by the worker.

#### F. What Is Collective Bargaining?

Perhaps most difficult of all problems of a substantive nature arising out of the Act are those which relate to collective bargaining. These problems enter through the fifth unfair labor practice, which is the refusal of an employer to bargain collectively with the representatives of the majority.<sup>27</sup>

The preamble of the Act makes it public policy to encourage "the *practice and procedure of collective bargaining*." It is also made public policy to *protect* the rights of the workers *for the purpose of their negotiating* the terms and conditions of their employment through properly designated representatives.<sup>28</sup> Must an agreement be reached? Must the agreement be written? Must the agreement if reached be for a definite period? All these questions were unanswered in the Act itself, and it has been necessary for the Board to define what constitutes collective bargaining. This task is difficult to do in a positive manner, but the task is made less onerous by stating what is not collective bargaining. The Board's approval will have important implications for the future of employer-employee relations.

What was the intent of the Congress on reaching agreements and reducing those agreements to writing? It is not clear, but the weight of the evidence may be indicated.

The Senate Report on the bill read:

<sup>27</sup> See Appendix I, Section 8(5).

<sup>28</sup> See Appendix I, Section 1. Italics supplied.

"The Committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

"But, after deliberation, the Committee has concluded that this fifth unfair labor practice should be inserted in the bill. It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as they have been designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace."<sup>29</sup>

The Senate Committee here regarded collective bargaining as a process which looked toward the conclusion of agreements.

The House Committee report, with regard to the subsection on collective bargaining, read only:

"The fifth unfair labor practice, regarding the refusal to bargain collectively, rounds out the essential purpose of the bill to encourage collective bargaining and the making of agreements."<sup>30</sup>

But the House Committee, when discussing the principle of majority rule, also said:

"As has frequently been stated, collective bargaining is not an end in itself; it is a means to an end, and that end is the making of collective agreements stabilizing employment relations for a period of time, with results advantageous both to the worker and the employer."<sup>31</sup>

<sup>29</sup> S. Report No. 573, 74th Congress, 1st Session, p. 12.

<sup>30</sup> H. Report No. 1147, 74th Congress, 1st Session, p. 20.

<sup>31</sup> *Ibid.*, p. 20.

Here the House Committee also regarded collective bargaining as a process.

Representative Connery, who had introduced the Wagner Bill in the House, saw the legislation as protection:

"This bill only applies where some employer says: 'I will not deal with the employees,' or 'I am going to fire this man because he tried to organize my plant,' or for the violation of any one of these unfair labor practices."<sup>32</sup>

Senator Walsh, Chairman of the Senate Committee in charge of labor legislation, during debate said with regard to bargaining:

"... Let me say that the bill requires no employer to sign any contract, to make any agreements, to reach any understanding with any employee or group of employees.

"Let me emphasize again: When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it. It anticipates that the employer will deal reasonably with the employees, that he will be patient, but he is obliged to sign no agreement; he can say, 'Gentlemen, we have heard you and considered your proposals. We cannot comply with your request'; and that ends it.

"There is no effort in that respect to change the situation which exists today. All employers are left free in the future as in the past to accept whatever terms they choose."<sup>33</sup>

During committee hearings on the Wagner Bill, Senator Walsh asked:

"There is nothing in the bill that permits the issue of an order or the inflicting of a penalty upon any employer who receives representatives of the employees and who conducts conferences with them, even if the conferences end in the inability of the employer to agree to the terms of the employee?"

<sup>32</sup> Congressional Record, 74th Congress, 1st Session, p. 9686.

<sup>33</sup> Congressional Record, 74th Congress, 1st Session, pp. 7659-7660.

Senator Wagner replied:

"No; you could not do that very well. But I am sure there is in the legislation the implicit obligation upon the employer to bargain collectively."<sup>34</sup>

On the floor of the Senate, Senator Wagner was asked whether industrial peace was the objective to be attained by certain features of the proposed legislation. He answered:

"Yes; and by the prohibition of certain *unfair labor practices* . . . which are intended to make the worker a free man [protection], to decide for himself whether he wants an organization, and if he wants one, what the type of that organization shall be."<sup>35</sup>

And again:

". . . The law does not require any employer to sign any agreement of any kind. Congress has no power to impose such a requirement. An agreement presupposes mutual consent. The law merely requires that an employer bargain collectively with his workers, which means that he shall receive their representatives and engage in a fair discussion, in the hope that terms may be voluntarily agreed upon by both sides without recourse to strife."<sup>36</sup>

Later Senator Wagner said:

"[The law] does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met. . . .

". . . The employer is obligated . . . to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter proposals; and to make every reasonable effort to reach an agreement."<sup>37</sup>

Thus, before the bill was passed there was no clear outline of collective bargaining. Apparently Senator Walsh did not think counter proposals were necessary, although Senator Wagner did.

<sup>34</sup> S. Hearings on S. 1958, 74th Congress, 1st Session, Part 1, p. 45.

<sup>35</sup> Congressional Record, 74th Congress, 1st Session, p. 7574. Italics supplied.

<sup>36</sup> Congressional Record, 74th Congress, 1st Session, p. 7659.

<sup>37</sup> Congressional Record, 74th Congress, 1st Session, p. 7571.

And despite the difficulty encountered by the National Labor Board and the first National Labor Relations Board, Congress was to leave the problem of collective bargaining and the written agreement to some agency other than itself. It will be recalled that Senator Wagner did not include the fifth unfair labor practice in the original draft of the bill, and the proscription was added only at the insistence of the members of the first National Labor Relations Board. That Board had found from experience the need for such a provision, for it had been difficult to persuade employers to sign agreements. Yet when the provision was added, even the most expansive congressional proponents believed that somehow the fifth unfair labor practice must refer only to the process of negotiation: The Act was to protect, that was major, and it was hoped and expected that the result would be the conclusion of bargaining agreements. Any view which would hold the attainment of agreements and the protection of rights on the same plane is not supported by the evidence.

The preamble of the Act makes it clear that the objective is to protect labor so that certain events can come about, but it was not anticipated that the agency created would have the responsibility of following through the protection to assure that agreements did result. When Congress amended the Railway Labor Act in 1934, it was clearly expected and anticipated that bargaining agreements would be reached; and indeed the agreements must be filed with the National Mediation Board. And under the Merchant-Marine Act of 1936, as amended in 1938, it is expected that the employers and employees in the maritime service will exert every reasonable effort to make and maintain agreements.<sup>38</sup> But this was not specified in the Wagner Act; and the hearings, the debate on the bill, and the Act indicate that the whole approach was only to set the stage for bargaining. It is important to point out this approach because if the Act is only to protect, then the Board's powers will be far less than if the Board exercises the function of following through the negotiation stage to the culmination of the process.

Further, it may be said that if the encouragement of collective bargaining as an objective of the Act had primary or equal standing with protection—rather than coming as a result of protection

<sup>38</sup> 49 Stat. L. (I) 1985 (1936), and 52 Stat. L. 953 (1938).

—then the whole approach of the Board is necessarily different from that which it would be if the Board only protected the right to organize and bargain collectively. For if the Board really has the task of encouraging collective bargaining, then here is an instance of a quasi-judicial agency promoting while it is administering preventive legislation. This would mean that the agency would be placed in a difficult position, for the Board would be expected not only to protect but also would be expected to follow through the whole process and actively to make certain that agreements are reached. It follows that there would be more intrusion by the Government into employer-employee relations.

The Board, following the lead and practices of the earlier boards, has taken the position that the Act can protect the worker only if the worker always has recourse to the Board when it is felt that the employer, in the bargaining process, is not exhibiting good faith. While this approach is the essence of realism, the Board is thereby driven much further into the employer-employee relationship than probably was ever anticipated by Congress. This situation demands extreme care on the part of the Board. Yet, no matter how much caution is displayed, and regardless of the care with which the Board follows traditional contract rights, the approach based on experience demonstrates the intermingling of the protection of rights in order to "set the stage" for collective bargaining, and the process of bargaining itself.

Under the Board's decisions, the standard set up is the display of good faith by the employer. Good faith and reasonable effort are justiciable but difficult subjects.<sup>39</sup> In order to determine good faith, the Board looks at the evidence; and the landmarks appear to be these:<sup>40</sup>

1. The employer can not simply meet with representatives and refuse to discuss terms and conditions.
2. The employer should make counter-proposals. If he does, the Board may pass on the reasonableness of the counter-proposals, for the negotiations must be carried on with an intent to reach an agreement.
3. The employer is not guilty of bad faith if he bargains until an im-

<sup>39</sup> The Supreme Court so held in *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937).

<sup>40</sup> See N.L.R.B., Third Annual Report, pp. 90-108, and cases there discussed.

passé is reached; but if conditions and issues change, the impasse may disappear and bargaining must be resumed.

4. If the employer does not meet the demands, he is still under a duty to bargain. Strikes and lockouts do not absolve the employer of his responsibility to bargain.

5. If an agreement is reached, it must be reduced to writing if the employees so demand.

6. The written agreement is not a matter for bargaining, and the refusal of such a demand is likely to indicate lack of good faith by the employer.

When the Board operates in the sphere of defining bona fide negotiation, it also operates in the sphere of passing judgment on the reasonableness of demands.<sup>41</sup> This, in effect, adds to the labor-court character of the Board and introduces a remote form of compulsory arbitration which ordinarily operates against only one of the parties.<sup>42</sup> Not only is the Board in effect arbitrating when it holds that an employer engaged in insufficient negotiation, but also the Board arbitrates when it decides that the employer has in good faith attempted to reach an agreement. For to hold that an employer has bargained in good faith is in reality official verification of the employer's position, and such a decision implies judgment of the employer's ability to yield to demands. The labor-court aspect is still further encouraged by the Board's entrance into situations where a trade agreement exists but has been violated. The Board's task is not eased by the presence of conflicting testimony in many collective-bargaining cases in a field where controversy, recrimination, half-truths, and misrepres-

<sup>41</sup> The board has criticized an employer who, in rejecting union demands, refused to open his books to union inspection and audit. In the *Matter of Knoxville Publishing Co.*, 12 N.L.R.B. No. 119.

<sup>42</sup> William Spencer, writing on the National Labor Board and the first National Labor Relations Board, says with regard to collective bargaining:

" . . . The Board's general statement of the employer's obligation [to bargain] seems to justify the implication that the Board believes that an employer who has been approached for collective bargaining must, for the sake of peace, make some concessions to his workers. . . . "

" . . . To the extent that the government directly or indirectly takes from the employer the right to say 'No,' it is forcing upon him unilateral compulsory arbitration. . . . "

W. H. Spencer, *Collective Bargaining Under Section 7(a) of the N.I.R.A.*, The Journal of Business of the University of Chicago, The Univ. of Chicago Press, Vol. VIII, No. 2, Part 2, p. 32, April, 1935. The present Board has followed and expanded the doctrines of the earlier boards.

sentation are freely engaged in by both sides, yet to the Board goes the task of introducing reason.

The Board's approach toward collective bargaining may be quoted in its own words:

"The net result sought by the collective bargaining provision is the making of a collective bargaining agreement. . . . The Act imposes upon the employer not only the duty to meet with the duly designated representatives of its employees and to bargain with them in good faith in a genuine attempt to achieve an understanding on the proposals and counter-proposals advanced, but also the duty, if an understanding should be reached, to embody that understanding in a binding agreement. . . . The Board has made clear that 'The final attainment of an understanding and the signing of the contract embodying the fruits of this understanding are part and parcel of the process of collective bargaining. The contract or agreement is part of and the culmination of the successful negotiations, and not a segment separate from the negotiations which have preceded it.'"<sup>43</sup>

This approach of the Board may be compared with that of the Supreme Court:

"The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' . . . The theory of the Act is that free opportunity for negotiation with accredited employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel."<sup>44</sup>

However:

"The legislative history of the Act goes far to indicate that the purpose of the statute was to compel employers to bargain collectively with their employees to the end that employment contracts binding on both parties should be made."<sup>45</sup>

The Supreme Court evidently believes that the necessary protection can be afforded by a Board which will protect the process,

<sup>43</sup> N.L.R.B., Third Annual Report, pp. 102-103.

<sup>44</sup> *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

<sup>45</sup> *N.L.R.B. v. Sands Mfg. Co.*, 306 U.S. 332 (1939).

not the result, and that while the bargaining process is mandatory the result to be reached is sequential and voluntary. Under the approach of the Board, the process and the end result are inextricably related and one, so that the functions of the Board necessarily extend to the stage of the actual agreement itself. Thus, the Board finds itself in the labor-court category. A less realistic approach, which would be based upon the assumption that the process and the result of the process can be somehow cast into different categories—corresponding on the one hand to the protective function, and on the other hand to the promotion function—would harmonize with the anticipatory view of Congress and the courts. But so long as the collective-bargaining proscription is a part of the Act, bedrock realism demands a conclusion that the Board can not divorce prevention and promotion; and hence the courts must finally determine in each case whether the Board has exceeded its powers in passing judgment upon employer-employee negotiations. Ultimately this must mean a review of the evidence; and since the courts are presumably proscribed from that function, the Board will remain partly a labor court. The only future entrance to be expected of the courts will be on the matter of signing bargaining agreements.

In addition to the substantive difficulties and interpretative ramifications attached to the negotiatory stage, it may be pointed out that the unions have not used their protection under the Act devoid of abuse—they have made use of the fifth proscription not in good faith themselves, by using the charge of the employer's refusing to bargain in order to obtain demands made upon the employer, such as the closed-shop, or an increase in wages, vacations with pay, etc.; and this demonstration of bad faith on the part of the unions is as reprehensible as the lack of good faith on the part of the employer.

The collective-bargaining proscription really breaks into two parts: (1) the negotiation of the parties, or the process itself, discussed just above; (2) the reduction of an agreement to a written contract by the parties.

The problems related to the agreement itself are being slowly resolved by the courts. The Board's position is that it can not force agreements to be made; but if an agreement is reached by the parties and if the employees so request, then the employer

must enter into, for a fixed period of time, a mutually binding agreement, which must be reduced to writing if the employees request. Action by the employer, such as posting a notice of an agreed-upon policy, which is unilateral in nature, will not satisfy the Board requirement. This approach reaches back to an early case, the *St. Joseph Stockyards Co.*, and the Board has consistently followed the policy there laid down:

"An assertion that collective bargaining connotes no more than discussions designed to clarify employer policy and does not include negotiation looking toward the adoption of a binding agreement between employer and employees is contrary to any realistic view of labor relations. The development of those relations had progressed too far when the Act was adopted to permit the conclusion that the Congress intended to safeguard only the barren right of discussion. The protection to organization of employees afforded by the first four subdivisions of Section 8 can have meaning only when the ultimate goal is viewed as the stabilization of working conditions through genuine bargaining and agreements between equals. That such is the goal is made clear by Section 1 of the Act, wherein the policy of the United States is stated to be the protection of self-organization of workers and the designation of their representatives for the purpose of negotiating terms and conditions of their employment."<sup>46</sup>

And further,

"The solution of the problem lies in the recognition of that attitude. Such an attitude grows out of an antipathy toward organization of workers and a refusal to concede that the policy of the United States shall be the policy of the respondent. It is designed to thwart and slowly stifle the Union by denying to it the fruits of achievement. It is based upon the knowledge that in time employees will grow weary of an organization which cannot point to benefits that are openly credited to its aggressiveness and vigilance and not to an employer's benevolence which on the surface may appear genuine but in truth is forced upon the employer by the organization. To many his unwillingness to enter into an agreement with a labor organization may seem no more than a harmless palliative for the employer's pride and to amount only to a petty refusal to concede an unimportant point purely as a face-saving device. But the frequency with which the old Board was compelled to denounce such a policy on the part of employers indicates its

<sup>46</sup> 2 N.L.R.B. 89.

potency as a device subtly calculated to lead to disintegration of an employee organization. Viewed from the other side, the main objective of organized labor for long has been the collective agreement and the history of organization and collective bargaining may be written in terms of the constant striving for union recognition through agreement. In many cases employees have left their employment and struck solely because of the employer's refusal to enter into a collective agreement. An objective which has been so bitterly contested by employer and employee, that has been the cause of many long and costly strikes, must be evaluated in the light of the conflict it has produced. . . . In our view of the Act, the minds of the parties having met, it imposed upon the respondent a definite obligation to embody the understanding in an agreement."<sup>47</sup>

The Board interpretation thus goes beyond the negative stage and visualizes positive action by the employer. Moreover, the Board does not regard its position on the written agreement to include the employer's views or desires. Therefore, concludes the Board, whether an agreement upon demand must be reduced to writing is not a matter of negotiation; rather, the employer's accession to such a demand is a matter of statutory imposition and an essential element of statutory duty. Then, reasons the Board, if the reduction of an agreement to a written status is not a matter of negotiation because the statute imposes the duty to reduce the agreement to writing, it is no defense for the employer to argue that an *impasse* was reached in the bargaining; and his refusal to accede to the demand would be evidence of bad faith and a violation of the Act.<sup>48</sup>

In the *Inland Steel Co.* case, and in other cases, the Board qualified its approach and left itself the flexibility it regards necessary. It thereby added to its character as a labor court. The Board held in the *Inland Steel Co.* case that the act "normally" requires an employer to embody understandings in a written agreement signed by him and the employees' representatives; but the Board left open the question whether, under certain circumstances, an employer might refuse to embody understandings in a written contract. If an oral agreement is acceptable to both parties, it will be approved by the Board; but under some circum-

<sup>47</sup> *Ibid.*

<sup>48</sup> First in *Matter of St. Joseph Stockyards* (*supra*); also in *Matter of Inland Steel Co.*, 9 N.L.R.B. 783; *Matter of Westinghouse Co.*, 22 N.L.R.B. No. 13, and others.

stances the employer must accede to a request to reduce the agreement to writing.<sup>49</sup> Thus, the Board retained for itself the power to decide which cases demanded that the employer accede to the request. There is no general rule, and apparently each case is to be determined on its merits.

In the *Inland Steel Co.* case the Board decided that the difficulties of an oral agreement were manifest, especially against a background of bitter and long employer-union controversy. This decision brought condemnation by the Circuit Court of Appeals for the Seventh Circuit, which in its dictum reasoned: The Board concedes that the Act imposes only the duty of negotiation, not the duty to reach an agreement; when the Board concedes that an agreement, if reached, need be signed only upon the request of the employees, and then *only in certain circumstances*, then the demand by the employees that the agreement be reduced to writing may be waived by the Board; and if it may be waived by the Board, it is arguable that the signing of the agreement itself becomes a matter of bargaining. This reasoning supported the employer's argument that the *written* agreement was itself a matter for bargaining. The Court could not believe that the Act imposed upon the employer a duty which would be applicable only in some cases. Since the statute made no mention of a signed agreement, the Court held none was required, and it refused to read into the statute that agreements were required in some cases and not in others. The Court held that the Board argued for what it thought the Act ought to be, not what it was.

Judge L. Hand, in the *Art Metals Construction Co.* case,<sup>50</sup> dealt with the question of the written agreement. After pointing out that the Act forces no agreement but that negotiation is required, he considered whether one term of an oral agreement shall be that the understanding be reduced to writing and whether to do so meant the loss of freedom in negotiation which the employer enjoyed under common law.

<sup>49</sup> See the decision in the *Westinghouse Co.* case, *supra*:

"... We hold that *under the circumstances* such as are here presented, it is the employer's obligation to accede to a request that understandings reached be embodied in a signed agreement. . . . Whether there may be, in some future case, circumstances indicating that the employer there involved may under the Act decline to embody understandings in a signed agreement, we need not here decide." Italic supplied.

<sup>50</sup> *Art Metals Construction Co. v. N.L.R.B.*, 110 F. (2d) 148, CCA-2.

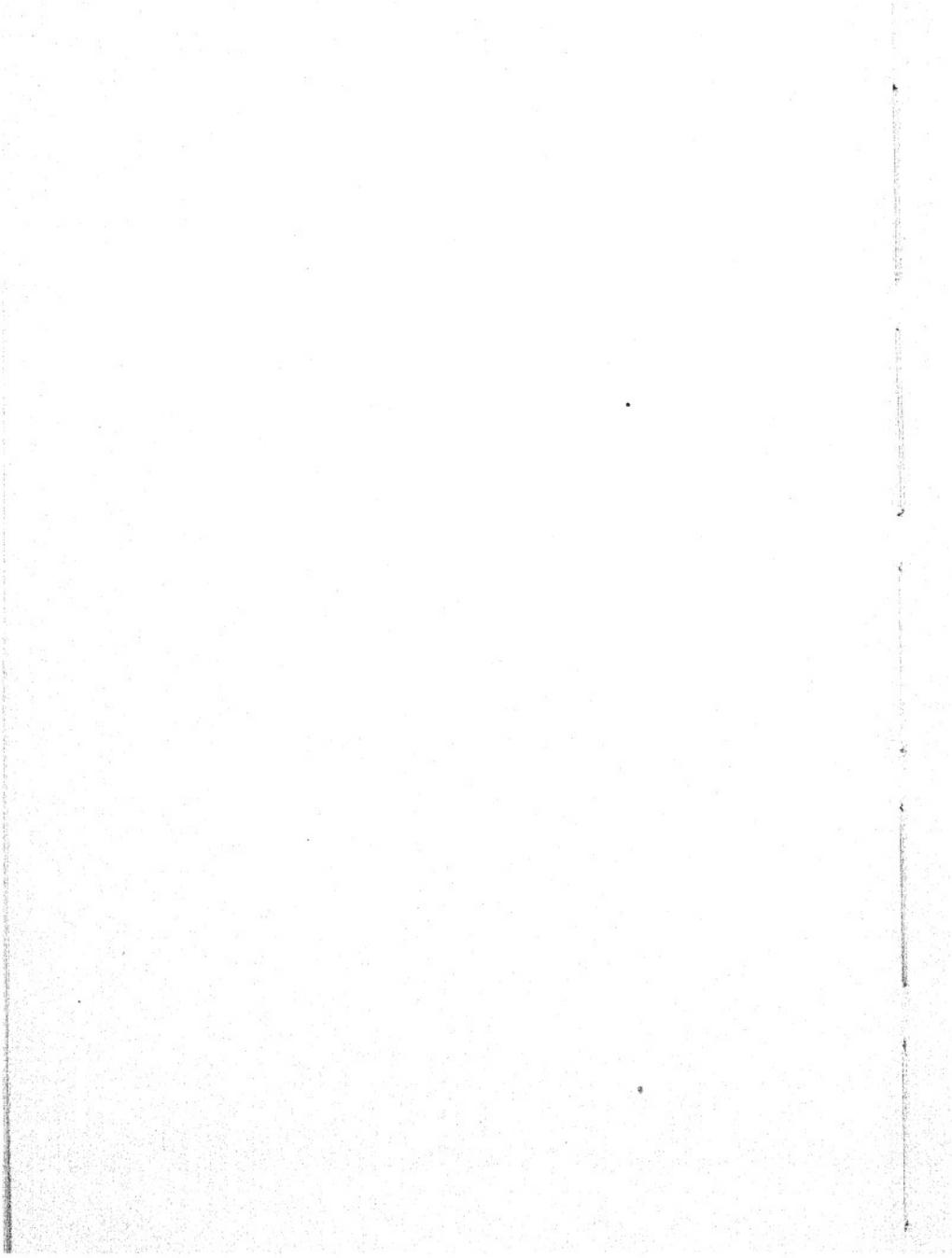
Of course, said the Court, it meant loss of freedom; but the Act itself, by giving the employees the right to use collective pressure, qualified the rights of the employer in this respect. Further, the implications of the grant of such power include whatever might be appropriate to protect the grant; and the written agreement was held to be not only appropriate but necessary, for freedom of contract did not include the right to put in jeopardy the ascertainment of what the promisor agreed to do. The employer's freedom is to refuse concessions and to exact concessions, but ". . . It is not the freedom, once they have in fact agreed upon those conditions, to compromise the value of the whole proceeding, and probably make it nugatory."

The Supreme Court, on January 6, 1941, resolved the question as to whether an agreement, if reached, must be reduced to writing.<sup>51</sup> The Court held that, although an employer is under no compulsion to reach an agreement, the employer, if he reaches an agreement, can not refuse to sign it because he never agreed to sign one. The freedom of the employer not to reach an agreement related only to matters of substance, said the Court, and it supported five of six circuit courts of appeal by holding that a refusal to sign a contract embodying agreed terms was a violation of the refusal-to-bargain proscription.

<sup>51</sup> *H. J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 (1941).

*Part Three*

Certification of Representatives



## Chapter VII. REPRESENTATION CASES

### A. General

Section 9 of the Act was included in order to facilitate collective bargaining.<sup>1</sup> The problem of who was representing what unit, and of the definition of that unit, was anticipated, and the Act provided the machinery whereby disagreement or uncertainty could be dispelled by an impartial governmental agency.

Section 9 is in four parts: (a) provides that the majority of an appropriate unit selects the representative—that is, the majority-rule doctrine. (b) makes it the duty of the Board to determine the appropriate unit in each case. (c) provides the Board with power, whenever there is a question affecting commerce, to investigate and to certify designated representatives no matter whether unfair practices are involved. Authority is given the Board to use secret ballot or "any other suitable method" to ascertain the representatives. (d) provides that whenever a Board order arising out of an unfair practice is carried to the courts, any determination of representatives made by the Board becomes a part of the transcript of record.

It should be emphasized that Section 9(c) provides only for investigation, and a proceeding thereunder does not result from a complaint; hence no order issues. The section makes possible only an authoritative declaration of an existing factual situation, and such declaration is not reviewable in the courts except in conjunction with a proceeding involving unfair practices. When the Board acts under this subsection, it is not compelling the selection of a representative but rather is ascertaining whether a representative has been selected and designated. This function is important, for in the absence of a representative the employer has no duty to bargain collectively.

<sup>1</sup> See Appendix I, Section 9.

Since Section 9(a) provides that the representative designated by the majority in an appropriate unit shall be the exclusive representative, there is imposed a duty on the employer to bargain with such selected representative and with no other. An employer's duty to bargain is not contingent upon a representation proceeding but only upon the presence of representatives, and the employer's duty may be enforced whether or not there has been a certification. Proceedings involving a refusal to bargain and representation are sometimes brought conjunctively through a labor organization charging a violation of the refusal to bargain proscription when the union is at the same time skeptical whether it could prove a majority in the appropriate unit. The usual procedure is to hold a joint hearing: If the union majority is not clear, the unfair labor practice complaint is dismissed, and an investigation is ordered; and if the hearing discloses a majority and refusal to bargain, the representation petition is dismissed, and duplication is avoided.

A proceeding involving either a refusal to bargain or certification of representatives raises the same two problems: (1) What is the appropriate unit for collective bargaining?; and (2) has a majority in that unit designated and selected a representative? This follows because an employer has not refused to bargain (although by law he has a duty to bargain whenever there is a majority) unless there is a representative designated by a majority in the appropriate unit, and any certification of representatives must likewise ascertain the majority in the appropriate unit.

### B. Typical Cases

The Board operates to investigate and certify representatives whenever a question arises concerning the representation of employees. Since one purpose of the Act is to encourage collective bargaining, the Board will find a question existing, will investigate representation controversies and certify representatives, whenever it appears that disagreement or uncertainty over the representative constitutes an obstacle to collective bargaining. The Board does not, however, exercise a roving commission in this respect but acts only upon petition, although Board rules per-

mit it to institute proceedings on its own motion.<sup>2</sup> The actual existence of a question concerning representation depends upon the circumstances, though representative situations may be indicated:<sup>3</sup>

1. The employer refuses to recognize a labor organization as the bargaining agent.
2. The employer insists the representative not be an "outsider."
3. The employer is willing to bargain with the representatives of a labor organization for the organization's members only.
4. The employer refuses to bargain because he claims the union does not represent a majority.
5. The employer disagrees as to the appropriate unit.
6. The employer questions the existence of a majority and demands proof of a type the union is not required to furnish.
7. Each of two rival organizations claims to represent a majority of the employees.
8. Each of two rival organizations insists upon conflicting bargaining units.
9. The employer and the organization enter into a stipulation that a question concerning representation exists.
10. The employer is willing to bargain but insists that a question of representation exists.

### C. The Existence of Contracts and the Time Element

It sometimes occurs that representation petitions are brought when a bargaining contract already exists. There is then a question of whether the Board shall respect the contract and let it constitute a bar or institute proceedings despite the contract. Again the Board is bound by no stereotyped procedure; rather, the Board exercises discretion to let the circumstances determine whether proceedings shall go on. While this administrative flexibility is advantageous to Board action, it may well push the Board into a contradictory position. The Board apparently regards the act best administered if proper representation is first as-

<sup>2</sup> N.L.R.B., Rules and Regulations, Series 2, Article III, Section 10(b). The petition may come from an employee, a person or organization acting on behalf of employees, or an employer.

<sup>3</sup> Drawn from Third Annual Report, N.L.R.B., pp. 127-133.

sured employees and then collective bargaining contracts follow; yet in an attempt to assure proper representatives it may be necessary, in effect, to abolish contracts.

The Board does not decide whether an existing contract is a bar to a representation investigation unless the parties so claim, but where the parties do so the Board must consider the question. Any contract made as a result of bribery, fraud, coercion, unfair labor practices, or by representatives not the choice of a majority has been held not a bar to proceedings. Nor does a bar exist if a contract is negotiated while investigation proceedings are pending. If the petitioning union has a contract whereby it bargains only for its members, the Board holds this to be no bar since the Act specifies the majority shall be the *exclusive* representative; and it may be necessary to ascertain whether the union has a majority. The Board has held no bar exists where the existing contract is about to expire or where the Board finds the appropriate unit to be different from the one on which the contract is based. The Board has also held that where a union petitions for a representation proceeding, the existence of a contract with the employer is no bar. This situation has arisen where a union had contracts with some companies included in the case but not with others, and the Board held elections at all companies.

Almost unanswerable questions arise over contracts. Suppose, for example, an employer has a contract with a union which bargains for its members only and then, as a result of an election, the employer must negotiate with the union representing all the employees. Apparently the union and the employer must iron out the matter in negotiation. The parties may agree finally to abide by the original contract, but reaching that decision might be a matter of a week's bargaining; and if so, what is the status of the contract during the interim?

A more difficult problem is presented when a contract subscribes to the statute but there is a petition for a representation proceeding. What sanctity surrounds the contract which embodies the objectives of the Act? The Board has said the prime purpose of the Act was to encourage the negotiation and conclusion of contracts, yet the Board may be faced with the necessity of, in effect, destroying contracts. There is no ironclad rule; but the Board will probably treat a one-year, unexpired contract as a

bar to representation proceedings. One-year contracts are regarded as desirable, and the Board will presumably not permit contracts drawn for a longer period to constitute a bar to representation proceedings.<sup>4</sup> The Board here believes representation to be more important than contracts, otherwise a five-year contract would bar representation proceedings.

This Board action was not charted by Congress, but the dilemma of right of contract or right of representation is real. The resolution of the dilemma is not to decide whether the primary purpose of the Act is to insure employee freedom to choose representatives, or to encourage collective contracts, for either choice leaves an unsatisfactory situation. Hence, the Board's compromise seems wise, even though it is in a sense contradictory. Such Board flexibility and the refusal to draw sharp rules open the door to criticism, but the dilemma demonstrates the necessity of giving broad discretionary powers to an administrative agency. Here is also another instance where the Board has the status of a labor court.

The question has arisen as to how often the Board will proceed where the same representation struggle is involved. The Board's administrative position is that election results are generally thought of in year terms, and the Board ordinarily will not engage in a series of proceedings. While the Act does not restrict petitions for certification, the Board believes that thinking in year terms makes for industrial stability.<sup>5</sup>

Any proceeding by an employer in lieu of a Board proceeding, such as an election, does not bar a Board investigation. The Board, however, gives effect to prior elections if convinced that there has been no violation of the employees' rights; and a consent election, if presided over by a regional director, would constitute a bar to representation proceedings.<sup>6</sup> Here the Board

<sup>4</sup> Contracts drawn for more than a year would freeze the representation situation. ". . . To prevent undue restriction on the selection of representatives . . . the Board has followed the principle that a contract does not constitute a bar . . ." where it covers an undue length of time and has been in effect at least a year." Fourth Annual Report, N.L.R.B., p. 75. Also see H. Hearings on N.L.R.A., Vol. III, pp. 1046-1047, and the Third Annual Report, N.L.R.B., pp. 134-139.

<sup>5</sup> *Ibid.*

<sup>6</sup> Fourth Annual Report, N.L.R.B., p. 76. Consent elections are those in which all the details regarding the conduct of an election are agreed to by the parties. The bargaining unit, the form of the ballot, the place and time of election, the

again has adopted a time period quite common in bargaining agreements—namely, one year. This time element in contracts, then, is not wholly the Board's action, though by using the one-year period in contracts and elections the Board is crystallizing the period in labor relations.

This problem of the time period illustrates how a law, designed to protect and police, carries implications unforeseen at the time of passage. Yet where an agency has been created, it must of necessity meet the problems. Here the agency is the Board, which clearly has the power to solve such problems; but to do so means that there are tripartite forces in the field of labor relations. For although the Board is impartial as between employers and employees, its decisions affect employer-employee relations.

#### D. "Proof" of a Majority

The Board has authority to "take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."<sup>7</sup> The Board has not relied on elections alone to determine the majority but has extensively relied upon other proof. Board discretion determines "proof," and the Board retains its flexibility to pass on each case as the circumstances dictate.<sup>8</sup>

In general, it may be said that until 1939 the Board would accept as "proof" cards, petitions, oral or signed statements, union membership cards, union membership applications, or union affidavits of membership, if such offerings were authentic or if the evidence was uncontested. While prior to 1939 the Board was reluctant to hold requested elections where there was sufficient "proof" uncontested by parties to the proceedings, since then the Board will hold an election if a contesting union or the employer so requests.<sup>9</sup> The Board insists that where means other than an election are used as "proof" there must be an absence of coercion or compulsion against the employee and any evidence to the con-

eligibility list, the method of tallying, etc., are determined by the parties themselves; and no Board order is required.

<sup>7</sup> See Appendix I, Section 9(c).

<sup>8</sup> Second Annual Report, N.L.R.B., pp. 91-93, 108-110; Third Annual Report, N.L.R.B., pp. 150-156.

<sup>9</sup> Beginning in 1939, the Board followed the policy of holding an election in the absence of overwhelming proof of the bargaining representative. This policy was announced in the *Matter of the Cudahy Co.*, 18 N.L.R.B. 526.

trary will bring an election. The emphasis of this statement is lessened by the Board's reliance, since 1939, on the election.

For an election the Board first determines when and where the election is to be held and the eligibility of the voters, all of which is embodied in the Direction of Election. The Direction of Election specifies an agent of the Board to conduct the election, and the agent cares for the details. The period of election varies from ten to thirty days, depending chiefly upon the number of voters who are to vote. If the Board has found an unfair labor practice, it directs the election to be held at a date sufficiently far in the future so that the effects of the violation shall have been dissipated; and when the regional director notifies the Board that circumstances permit a free choice of the bargaining representative, the Board orders an election.

In determining the eligibility of voters and the date of the election, the Board has the objective of extending the voting privilege to those having the status of employees who have an interest in the selection of the representative for the unit. The Board has used the date the parties agree upon for the election to determine who may vote; it has validated as eligible all employees as of the date of the Direction of Election; it has regarded as eligibles the employees on the payroll during the payroll period preceding the Direction of Election; it has established as eligibles those on the payroll at the date of the first hearing; and it has permitted to vote only those on the payroll the date the petition is filed. However, since the middle of 1939 the eligibility date has been the payroll date next preceding the date of the Direction of Election. The settlement on this date cared for the problems raised by those workers hired since the date of the petition, perhaps months before, or those who had been discharged or had quit. The present practice prevents unions "jockeying" for a favorable payroll date. Regular employees who have been furloughed, laid off, who are ill or on vacation, or who anticipate returning to work, are counted as eligibles. In case of strike the Board takes those employees as of the last working day or payroll period prior to the strike, while if a lockout is involved the period preceding the date of closing is used.

The candidates on the ballot are always union organizations, although the act permits individuals' names providing they are au-

thorized to represent employees. The Board will not place a union on the ballot if it has no, or a very few, members in the unit. Nor will the Board place on the ballot the name of a union found to be company-dominated. Requests to the Board for blank spaces on the ballot in order that the voters may write in the name of an organization are refused on the grounds that evidence showing the demand for representation should have been introduced in the hearing prior to the Direction of Election. As a practice, the Board insists that only those organizations which participate in the hearing receive a place on the ballot, although a union is not required to appear. The Board has occasionally permitted a union to withdraw from the election.

## Chapter VIII. THE MAJORITY-RULE REQUIREMENT

### A. Interpretations of "Majority"

The terms of the Act provide that the majority of the appropriate unit shall designate the exclusive representative. Where the majority is designated without an election, majority presumably means a majority of all who would be eligible to participate in an election. Where an election is held, the Board has gone through a metamorphosis in reaching its present interpretation of what constitutes a majority.

#### 1. "*Majority of Eligibles*"

Early in Board history there was no certification unless a majority of those eligible voted for the representative. This interpretation led to situations where the fewness of participating voters meant no collective bargaining,<sup>1</sup> and this was deemed unsatisfactory.

#### 2. "*Majority of Those Voting Where a Majority Vote*"

On July 3, 1936, the Board changed its interpretation of a majority to subscribe to that verified by the circuit court of appeals in deciding a case under the Railway Labor Act as amended in 1934. There the court held that a majority of those voting is sufficient to designate a representative providing a majority of those eligible to vote participated. This construction was first applied by the Board in the *Associated Press* case,<sup>2</sup> and was followed until unions

<sup>1</sup> Usually cited is *Matter of the Chrysler Corp.*, 1 N.L.R.B. 164, where 700 were eligible and but 125 voted. There was no certification.

<sup>2</sup> 1 N.L.R.B. 687. The circuit court decision in the railway case was upheld by the Supreme Court in *Virginia Railway Co. v. System Federation No. 40*, 300 U.S. 515 (1937). The National Mediation Board interprets majority to mean a majority of those voting provided a majority of eligibles votes. See Second Annual Report, N.L.R.B., pp. 114-115; National Mediation Board, Second and Third

discovered that they could prevent a competitor from winning by boycotting an election and thereby preventing a majority participation.

### 3. "Majority of Votes Cast"

The necessity for a different interpretation was clearly presented in the *R.C.A. Manufacturing Co.* case, decided November 7, 1936.<sup>3</sup> There, one union coerced employees and boycotted the election, so that of 9,752 eligibles only 3,163 votes were cast; 3,016 of the votes were for the union boycotted. The Board decided that to require participation by a majority of the eligibles put a premium on intimidation and sabotage or even permitted a minority by peaceful persuasion to prevent a certification where there were voters subject to change of mind. Therefore the Board held that a majority of the votes cast would determine the representative, and this rule has been followed.

Since the Board interprets the majority rule to mean a majority of the votes cast, how few could the votes be before the Board would refuse to certify? The Board's rule is that a "substantial" number must participate, and each case and its facts are considered separately. The criterion for "substantial" is that the vote must evidence some real desire for collective bargaining,<sup>4</sup> although the vote is ordinarily sufficient to constitute an unquestionable "substantial number."

### 4. The "Neither" Category

Where only one union is involved, that union's name goes on the ballot; and the employees vote for or against it as their representative. If a majority votes against the union, the Board dismisses

Annual Reports. The Supreme Court has never directly sustained the majority of votes cast interpretation (*infra*) since in cases reaching the Court a majority of eligibles has voted. In the case of *New York Handkerchief Mfg. Co. v. N.L.R.B.*, 114 F. (2d) 144, CCA-7, one question presented was whether the Board could utilize an election as the basis for certification if the election was participated in by less than a majority of the employees of the appropriate unit. Out of 225 eligibles, only 56 voted, and 53 voted for the union. The Board certified the union and the circuit court upheld the Board, although the court took account of the employer's opposition to the union. The Supreme Court denied certiorari November 18, 1940.

<sup>3</sup> 2 N.L.R.B. 168.

<sup>4</sup> There is no categorical or mathematical criterion for "substantial." H. Hearings on N.L.R.A., Vol. III, p. 1049 ff.

the petition. In the past, when two candidates were claiming to be representatives while the "majority of eligibles" interpretation was used, the employee could vote against a union, or both unions, by casting a blank ballot or simply not voting. Thereby the employees could prevent a candidate's receiving the votes of a majority of the eligibles. When, however, the Board adopted the "majority of votes cast" interpretation, the situation was presented whereby a voter could not vote against both unions or against collective bargaining. For if he refused to vote, a representative would be designated, unless, as rarely happened, an insubstantial number voted. A vote based on "the lesser of two evils" would still be an affirmative choice, and his choice would be in default of the opportunity of expressing his true choice—Neither.<sup>5</sup>

To meet the situation the Board on its own motion provided that a place on the ballot should be provided where the employee could vote against all candidates.<sup>6</sup> This is the "Neither" category on ballots with two candidates, "None" on ballots with more than two. Thus, a blank ballot became equivalent to no vote at all, since the employee could express disapproval. The present ballot, therefore, seems to be the logical development; and it permits a worker to express his choice, whether negative or affirmative. The use of the "Neither" category, however, gave rise to the possibility of an actual minority's thwarting the bargaining desires of a majority. For example, in the *Consumers Power Co.* case<sup>7</sup> the results of the election were as follows: Total number of ballots cast, 2,806; total for AF of L, 1,072; total for CIO, 1,164; total for Neither, 506. One thousand four hundred and four votes were necessary for certification, and the 506 votes cast for Neither, an actual minority, would prevent any designation. But to care for

<sup>5</sup> Assuming a substantial number voted, every case where there were two candidates would necessitate a designation of a representative.

<sup>6</sup> First in *Matter of American France Line*, 3 N.L.R.B. 64, Aug. 16, 1937. The procedure was first discussed by the Board in *Matter of Interlake Iron Corp.*, 4 N.L.R.B. 55, where one of the unions petitioned that "Neither" be removed from the ballot to prevent a minority causing no representative to be designated. For those who might interpret "Neither" to be a choice for individual bargaining the Board expressly overruled its decision in the *International Mercantile Marine Co.* case (1 N.L.R.B. 384), in which it had held that there would be no place on the ballot for an expression of preference for individual bargaining.

<sup>7</sup> 9 N.L.R.B. 742. The Supplemental Decision and Second Direction of Election (run-off) are at 11 N.L.R.B. 848.

such an occurrence the Board had already adopted the run-off election.<sup>8</sup>

### 5. *The Run-off Election*

A run-off election is necessary whenever "Neither" does not get a majority, nor does any of the other candidates, provided there is a request from the leading organization for a run-off election.

Until March, 1940, if only two unions were involved, the union with the greater number of votes was the only candidate on the run-off ballot; and the employees chose whether or not, in order to have a bargaining representative, they would subordinate their preference as between two unions—that is, they voted "yes" or "no" for the one union on the run-off ballot. If there were more than two unions in an election and the result was inconclusive, the Board held successive run-off elections. The candidate which received the least number of votes in the preceding ballot was eliminated from each successive ballot until a representative was selected or rejected by the majority.

When the Board was first confronted with three or more unions on the ballot, its procedure was to put on the run-off ballot only the candidate receiving the highest number of votes, but it so happened that in the case which determined the procedure neither of the two other candidates requested to be included in the run-off ballot.<sup>9</sup> Hence, the Board regarded itself as without precedent when the *Aluminum Co.* case arose.<sup>10</sup> In the latter case the original ballot carried the CIO, the AF of L, and the Independent. The Independent received 1279 votes, the CIO 961, the AF of L 708, and 100 voted "None." There was no majority and the Independent requested a run-off. The CIO, which was second highest, requested a place on the run-off ballot. The request was unopposed by the Independent and opposed by the AF of L. The Board, therefore, considered the CIO request in light of the preceding *Aluminum Line* case and decided that the fairest procedure, when there were two or more contestants on the original

<sup>8</sup> The run-off election was first made a policy in *Matter of Interlake Iron Corp.* case, 4 N.L.R.B. 55, and the policy has since been followed. The first election held was in the *Fedders Mfg. Co.* case, 5 N.L.R.B. 269.

<sup>9</sup> *Matter of Aluminum Line et al.*, 9 N.L.R.B. No. 16a.

<sup>10</sup> *Matter of Aluminum Co. of America*, 12 N.L.R.B. No. 34; 13 N.L.R.B. Nos. 11, 11b; 15 N.L.R.B. No. 42.

ballot and the result of the election was inconclusive, was to conduct successive run-off elections, eliminating from each successive ballot the organization receiving the lowest number of votes on the preceding ballot. This would proceed until a representative was selected by a majority or a majority had signified that none of the organizations was desired for collective-bargaining representative. "None" or "Neither" was to remain on each successive ballot. Since the employees had not known the policy, the Board set aside the first election and started over with the rules clarified for all.

The AF of L objected<sup>11</sup> because the Board granted a petition for a new election in the *Aluminum Co.* case where three unions were involved and the two leading organizations desired to appear on the run-off ballot, yet the Board refused the request in the *Consumers Power* case, where but two unions and "Neither" were on the ballot. Was there an inconsistency? If but two unions were involved, the one receiving the lower number of votes was dropped, which is to say that the one receiving the higher number of votes appeared on the run-off; where three unions were involved, the candidate receiving the lowest number of votes was dropped, but as a matter of arithmetic it followed that the two candidates receiving the highest number of votes appeared on the run-off ballot.<sup>12</sup> The Board did entertain and act favorably on a union request where three unions were involved and refused to do so where but two unions were involved, but circumstances justified such action.

The Board's refusal to change the form of its run-off election led the AF of L to seek court protection for what it regarded as its rights in the *Consumers Power* case.<sup>13</sup> There the CIO had led the AF of L by very few votes in the original election, yet only the CIO went on the run-off ballot. The AF of L appealed to the circuit court, which not only held that it had power to review the Board's election proceedings but also that the Board acted unlawfully in excluding the AF of L affiliate from the run-off ballot. The Board took the case on writ of certiorari to the Supreme Court, which held that representation proceedings were not re-

<sup>11</sup> See S. Hearings on N.L.R.A., Part 4, pp. 762-764.

<sup>12</sup> Note that both decisions followed the *Interlake* case, *supra*.

<sup>13</sup> *N.L.R.B. v. International Brotherhood of Electrical Workers et al.*, 308 U. S. 413 (1940).

viewable in the courts, hence it did not pass on the run-off election.

The AF of L contention in the *Consumers Power* case was not without merit. "Neither" got 506 votes, and the CIO received but 92 more than the AF of L (AF of L, 1072; CIO, 1164; "Neither," 506). With 2236 favoring the two organizations, the AF of L petitioned that the run-off ballot contain its affiliate. It may be argued that the "Neither" vote had its opportunity in the original election and that if the Board put but one union on the run-off ballot the "Neither" vote could again exercise its choice. This would be an injustice to the AF of L voters who could vote against the CIO but not for the AF of L. It is then a question of just how far the minority should be cared for by permitting them to vote for no bargaining as against not permitting the AF of L voters to vote for their choice. In this case 506 "Neither" votes were cared for, and 1072 AF of L votes were not, though the AF of L votes were not completely without expression since they could vote against the CIO.

The Federation admitted that the run-off method was impartial, but they argued that the method on its merits was unsound.<sup>14</sup> The AF of L urged that the Board adopt the procedure of the New York State Labor Relations Board. The New York law, however, was not clear-cut.<sup>15</sup> The New York Board put "Neither" on the ballot only if evidence indicated that perhaps a bare majority of eligibles desired to be represented by the organizations and if there was a request that "Neither" be given a place. The law specifies that the representative is determined by a "majority of the employees voting in an election," and the New York Board has held that the number casting ballots must be "substantial." The legislation provides that in a run-off election only the two highest organizations are placed on the ballot, but this refers to a case where there are three or more nominees and is "presumably inapplicable to the situation where the choice . . . is representation by one of two unions or by neither."<sup>16</sup> Thus, the latter case demanded state-board interpretation of the law just as in the Wagner Act. The New York Board, however, when confronted with the two-union situation, let the voters choose between the two unions,

<sup>14</sup> S. Hearings on N.L.R.A., Part 4, pp. 762-764.

<sup>15</sup> Annual Report of the Industrial Commissioner, State of New York, N. Y. State Dept. of Labor, Legislative Document (1939) No. 21, pp. 132, 135.

<sup>16</sup> *Ibid.*

yet the New York interpretation brought objections and certainly was no final solution of the problem.

Judge Padway, counsel for the AF of L, proposed another type of run-off:<sup>17</sup> He would put the two unions on the ballot, drop "Neither," and require a majority based upon the number of votes in the original election. If, for example, 2700 voted in the first election, then there would be no certification if one of the unions did not get at least 1351 votes in the run-off election. The justification for such a method is that in effect it is similar to the situation where only one union is on the ballot and the workers vote for or against that union with a majority required for certification. Moreover, though the "Neither" vote had its opportunity in the original election, it can ignore the run-off and still, in effect, vote against both unions since 1351 votes are required for certification. This, however, might permit a minority to thwart the bargaining desires of a majority. Assume 2700 votes in the original election, of which 1050 are for the AF of L, 1150 for the CIO, and 500 for "Neither." Now, if 1351 votes are required and the AF of L and CIO votes remain intact on the run-off, and the "Neither" does not vote, then there would be no bargaining because some of 500 votes prevent it. One can not assume no bargaining is desired, since a majority has voted for representation. Aside from this "minority-rule" possibility, the method appears comparable to the situation where there is but one candidate. If in the run-off election 1351 were to vote for one organization, it would indicate that a majority of those who participated in the first election sufficiently desires representation to forego the preferred organization or "Neither" preference.

The Board has been concerned over the "Neither" preference and the run-off election form. When the form was first announced, Board member Edwin Smith dissented from the majority and offered another possibility.<sup>18</sup> Mr. Smith recognized the desirability of the "Neither" category in order to prevent representation by a majority choice of a minority of employees. To avoid such a condition and yet not unduly emphasize "Neither," Mr. Smith argued that if "Neither" received a minority of the total

<sup>17</sup> H. Hearings on N.L.R.A., Vol. III, pp. 836-837.

<sup>18</sup> See his dissent in *Matter of Interlake Iron Corp.*, 4 N.L.R.B. 55, and in *Matter of R. K. LeBlond Machine Tool Co.*, 19 N.L.R.B. No. 108.

votes cast, the union with the most votes should be certified. Then the "Neither" votes would indicate that a minority desired no collective bargaining by either of the two unions; but the minority would be ineffective against the desires of the majority of the employees, the majority of whom would designate a representative. For example, if 1500 votes were cast, 600 for the AF of L, 500 for the CIO, and 400 for "Neither," the AF of L would be certified. No representatives would be certified if "Neither" received a majority. Such a procedure would obviate the need for run-off elections. Too, the procedure would be similar in effect to the run-off procedure suggested by Mr. Padway in that the emphasis placed on "Neither" would be minimized.<sup>19</sup>

When William Leiserson became a Board member in 1939 he objected to the run-off election. Mr. Leiserson dissented strongly in the *Coos Bay Lumber Co.* case,<sup>20</sup> where all opinions discussed the run-off election. A summary of the arguments presents the approach of the majority of the members and of Mr. Leiserson:

#### *For the Run-off Election*

1. The Act does not prescribe the form of run-off, the details of the election procedure, or how to ascertain representatives.
2. The policy has been and should be to provide opportunity to employees to register disapproval of the candidates.
3. There is a need to prevent the minority's thwarting the desires of the majority if the majority can unite and agree on representation.
4. Congress left the election, or method of ascertaining the majority, to the Board's discretion.
5. The run-off election does not involve a fundamental policy of labor relations; and objections urged by unions are against the form, not the propriety of the election.
6. The run-off is not determining a "second choice" majority; but if it were it would be better than a minority preventing bargaining, which is the alternative.
7. Any majority determined is not "artificial" but results from freedom of choice. Employees do not have to vote for a competing organization but can vote against it.

<sup>19</sup> Elections under the Act are not comparable to political elections, where one of the candidates will be elected. The employees are not required to select a representative, and that is the logic of the "Neither" space on the ballot. The problem then becomes one of deciding whether or when to cease emphasizing "Neither."

<sup>20</sup> 16 N.L.R.B. No. 50.

*Against the Run-off Election*

1. There was no majority in the first election; an election where employees can vote only for or against the leading organization limits choice since they can not vote for the other one.
2. The run-off is a form of preferential voting to create a second-place majority where the first election fails to show one. This is contrary to the Act, for Congress did not grant the power for second-choice voting. Congress could have provided for plurality certification, or it could have provided for a preferential system; but it did not, and the Board should not adopt a method whereby an artificial majority is determined.
3. The Board does not know whether or not the employees decide to unite; and since they are forced to vote against an organization, they are not uniting, for they are voting against any collective bargaining, and this thwarts the purpose of the Act.
4. If the employees do unite, the Board in effect is transferring allegiance. It should not do that but rather let the organizations get more adherents and later hold another election.
5. If the employees vote against all collective bargaining rather than for the representative on the ballot, then a minority is depriving a majority of any collective bargaining.
6. No run-off elections are held unless requested. To order elections in some cases and not in others is arbitrary. Congress did not intend there be no representatives in some cases and not in others where there was no majority.
7. In any case it is not "within the province of the Board to seek second or third choice majorities by one of the questionable methods of preferential voting."

How valid are Mr. Leiserson's objections? He objects that the Board seeks "second or third choice majorities by one of the questionable methods of preferential voting." The implication is that a second or third choice majority is somehow worse than a first choice majority. Preferential voting is to establish a bona fide majority and to provide for fullest expression by the electorate. If the method ascertains the true desires of the voters, the name of the method is immaterial. First choices are not ignored because second ones are counted. The term preferential voting means an expression of preferences, and necessarily second and third choices are involved.

It is, of course, true that the Board does not know whether the employees want to "unite" on a representative, but that is obviously and exactly the reason the Board holds a run-off election. No run-off would be necessary if the employees had united.

The objection that Congress did not authorize the run-off election is only one interpretation of the Act and of congressional intent. Congress could not foresee the split in the labor movement, and the usual majority rule seemed adequate. But certainly there is no inflexible definition of "majority," as shown by such agencies as the National Mediation Board. Indeed, as a member of the National Mediation Board, Mr. Leiserson had to decide whether "majority" meant a majority of the votes cast, of those eligible to vote, or of the votes cast providing a majority participated. Clearly the Act did leave wide discretion with the Board, and the Board functions to ascertain the desires of employees as to who shall be their representatives or whether there shall be any at all. The Act does not prohibit the run-off election. The Supreme Court has never passed on the run-off election as such, but it did uphold the congressional intent not to have the Board's determination of representatives subject to court review in the absence of an employer's refusal to bargain.<sup>21</sup>

Mr. Leiserson, while pointing out that inconclusive contests result from the "Neither" category, said that "Whether this should be done or not is not involved in the present case."<sup>22</sup> But surely it was; for the AF of L received 195 votes, the CIO 188 votes, and "Neither" 36 votes. Obviously "Neither" commanded the balance of power.

The efficacy of the run-off election simply can not be adequately discussed without considering the development of the "Neither" category and the situations resulting from its use.<sup>23</sup> The use of "Neither" surely subscribes to the purposes of the Act, for it is a much-needed concession to the employee who wishes to say, "A plague on both your houses." If "Neither" and its logic are justified, then the run-off election logically follows. Whether or not

<sup>21</sup> *N.L.R.B. v. International Brotherhood of Electrical Workers et al.*, 308 U. S. 418 (1940).

<sup>22</sup> 16 N.L.R.B. No. 50. See the footnote in Mr. Leiserson's opinion.

<sup>23</sup> Mr. Leiserson would apparently abolish "Neither." "The petition . . . should be dismissed without prejudice to the right of either organization to file a new petition whenever it can make a *prima facie* showing that it is the designated representative of a majority of the employees." *Ibid.*

the run-off election is called preferential voting, which one would suppose that it is, is unimportant. If a simple "yes" and "no" proposition is presented, such as voting for or against one union on a ballot, then Mr. Leiserson's conception of majority rule is feasible and adequate. His approach is even adequate where the voters are choosing between two unions. But where there is an attempt to resolve a complicated situation and still reflect majority preferences, the simple majority ballot is unsuitable.

Mr. Leiserson's argument that the Board acts arbitrarily by ordering elections in some cases and not in others is debatable. The answer is made that the union receiving the most votes in the original election should not be required to be a candidate against its desires. This explains the Board practice of holding an election if the leader so requests. The Board might proceed on the assumption that a run-off election would definitely establish a majority preference in every case.

What are the possibilities where "Neither" is used and no majority for the union candidates or "Neither" results from the original election?<sup>24</sup>

1. The petition may be dismissed. This may be objectionable since a majority has indicated a desire for collective bargaining and the voters may be able to unite on a representative.

2. A run-off with the two unions on the ballot. This possibility gives no genuine expression to the "Neither" vote since it would have no opportunity to reject. It is the same question as whether or not "Neither" should go on the ballot at all.

3. A run-off with only the leading union on the ballot and the employees vote for or against it. This gives the "Neither" group expression but deprives some of the employees of their votes for their favorite organization, which is not on the ballot.

4. A run-off with the next to highest union on the ballot and the employees vote for or against it. This is undesirable in view of the results of the first election.

5. The Board could direct possibility number 3; and if the results were indecisive in that a majority votes against the leading organization, the Board could direct number 4. This would probably mean two run-off elections, and in the second run-off election those who constituted the union with the most votes in the original election

<sup>24</sup> Drawn from the Board's brief before the Supreme Court in *N.L.R.B. v. International Brotherhood of Electrical Workers*, 308 U. S. 413 (1940).

would be asked to change their allegiance in order to have any collective bargaining at all. This would be undesirable.

6. The Board could use some other means of ascertaining a majority, but this is hardly a possibility since the Board presumably would have relied upon the election only if other means were not suitable.

Of the six possibilities, only the first three are important; and the Board followed the third until March, 1940.

The unions opposed the use of the third possibility on the grounds that the result was predetermined and that the leading union became the Board's nominee by going on the run-off ballot alone. The run-off results disprove the logic of the claim: Out of thirteen run-off elections closed up to October, 1939, in six the union on the run-off ballot failed of election, and won in seven; of the thirteen, six were requested by the AF of L and seven by the CIO.<sup>25</sup> Nevertheless, this "logical" argument, added to the objections of the AF of L, together with the disagreement of the Board members themselves on the form of the run-off election, constituted a demand that the second possibility be used. In March, 1940, the form of the run-off election was changed in the *LeBlond* case.<sup>26</sup>

#### 6. *The LeBlond Case*

The form of run-off election adopted in 1940 was that where neither union candidate nor "Neither" received a majority in the original election, the "Neither" in the run-off election would be dropped from the ballot and the union receiving the higher number of votes in the run-off election would be certified. If, however, "Neither" received a plurality in the original election, no

<sup>25</sup> *Ibid.* These same figures were used by Mr. Leiserson in the *Coos* case (*supra*) to prove that the use of the run-off election prevented a majority from collective bargaining. To October, 1941, there were 58 cases involving the run-off election which resulted in certifications or dismissals. 34 were won by the union receiving a plurality in the first election; 14 were won by the union receiving the second highest vote in the first election; 10 run-offs resulted in dismissals. These totals furnished through courtesy Information Division, N.L.R.B.

<sup>26</sup> *Matter of R. K. LeBlond Machine Tool Co.*, 19 N.L.R.B. No. 108. Of 555 votes cast, 266 were for the Amalgamated Ass'n of Steel & Tin Workers of N. A., Local No. 1702; 236 were for the Independent Employees Ass'n; 44 were for "Neither"; (9 were challenged, blank, or spoiled). Thus, 278 was the necessary vote for a majority, so the "Neither" vote was important.

run-off election would be permitted. For example, if there were 100 votes with 45 for "Neither," 35 for union "A," and 20 for union "B," then there would be no run-off election.<sup>27</sup>

The change in the run-off form came because the membership of the Board was changed. Mr. Leiserson argued again in the *LeBlond* case that the Board had no authority to order a run-off election. He would have no certification at all in such a case, and he believed the Board should not "assume" the authority.<sup>28</sup> However, since the prevailing opinion was in favor of the run-off, Mr. Leiserson would drop "Neither" (because they had had their opportunity) and put the two organizations on the run-off ballot.

Mr. Edwin Smith always held that the Board clearly had the authority to order the run-off election. He so argued in the *LeBlond* case, and in addition he claimed that such a course was sound and practical as a matter of policy. Mr. Smith always desired to modify Board procedure with respect to the run-off election, since he emphatically urged that a small "Neither" group should not be permitted to thwart the desires of a majority, who desired some form of collective bargaining. Therefore, once the "Neither" group voted and resolved the issue as to whether there should be no form of collective bargaining, Mr. Smith favored the run-off to be a choice between two unions, inasmuch as the majority had expressed themselves desiring some form of representation. Mr. Smith did not regard it as erroneous to assume that employees who voted for the two unions desire collective bargaining irrespective of the organization selected. He held that any doubt should be resolved in favor of a presumption that would result in the choice of some collective representative and thereby carry out the "manifest policy of the Act." Moreover, he

<sup>27</sup> So Chairman Madden testified to the Smith Committee—Vol. IV, No. 1, p. 17. This in fact happened at the General Motors election, Delco-Remy Division. The "Neither" received 2774; CIO 2454; AF of L 688. There was no run-off permitted. If the "Neither" were here removed from a run-off ballot and if in the run-off all factions remained united (as they might very well do in light of the labor schism), then the CIO, a clear minority, would be the bargaining representative for all. Smith Hearings, Vol. III, No. 17, pp. 631-634. Whenever the two unions together obtain a majority of the total votes in the original election, the assumption is that there is a desire for collective bargaining, provided, however, that "Neither" does not get a plurality.

<sup>28</sup> The final report of the Congressional (Smith) Investigating Committee read:

"As there is no authority anywhere in the Act [for the run-off election], the committee is obliged to conclude that the Board invented this out of whole cloth. . ." Smith Hearings, Vol. IV, No. 14, p. 467.

pointed out that by dropping one of the unions from the run-off ballot the employees had to vote for a union really not their choice, or for no collective bargaining at all. For all these reasons Mr. Smith held that the two organizations should go on the run-off ballot and that "Neither" should be dropped in every case where it did not receive a majority, even if it received a plurality.

Under the agreement reached by members Leiserson and Smith, Chairman Madden was left a dissenter, although Mr. Madden repeated in the *LeBlond* decision that the Board had the authority to order the run-off election and that it was sound as a matter of policy. He disagreed with the elimination of any place on the ballot where the employees could vote against representation by any labor organization. Mr. Madden emphasized that the employees are to have a representative only if they so desire, and he believed that the majority holding might force a particular organization on even a majority of the employees and thus remove that freedom of choice which the Act guarantees. Mr. Madden argued that it was unwarranted to assume that those voting for one of the unions desire some organization for collective bargaining regardless of which organization was to be representative and that opportunity to register disapproval should be provided in order not to assure the selection of one of the organizations. Moreover, Mr. Madden argued that the majority opinion meant that the "Neither" interest was dropped, not the interest receiving the smallest number of votes in the original election. If, he reasoned, there was a unit with 100 voters, the result might be 49 votes for "Neither," 45 for "A" union, and 6 for "B" union; the majority's theory would demand it to drop "Neither" on the run-off and compel a vote for "A" or "B," each of which received fewer than did "Neither."<sup>29</sup> "Neither" in effect would be disfranchised. Therefore Chairman Madden argued for the practice of permitting the employees to vote for or against the organization receiving a plurality of votes in the original election.

The absence of congressional voice and a broad grant of power leave to the Board, without recourse to the courts, this insoluble problem. Reasonable objections can be brought against any device set up by the Board. Basically the problem is one of interpreting the broad purpose of the Act. Again, if the Act is primar-

<sup>29</sup> But in practice there is no run-off where "Neither" gets a plurality.

ily to protect the right to organize and if the collective bargaining flows *from* the protection, then no "Neither" nor run-off election would follow, since certification would follow only a simple majority showing. But if the Act is to protect rights and *equally* to promote collective bargaining, then the Board is necessarily driven to "Neither" and the run-off election, bringing in its train the insoluble problem that must mean a pragmatic course of action for the Board, much criticism, dissatisfaction, charges of bias, and the intrusion of government as a positive directing force into employer-employee relationships.

### B. Majority Rule *v.* Proportional Representation

The difficulty of ascertaining the majority once the majority-rule principle is decided upon is to be distinguished from the majority rule *v.* proportional representation controversy, for the adoption of the majority rule is itself open to discussion. In the congressional hearings held on the Wagner Bill, those who favored the legislation also favored majority rule.<sup>30</sup> Opponents of the bill argued for proportional representation and pointed to the collective-bargaining agreement in the automobile industry in 1934. There the different group affiliations were given representation according to their strength.

The committee reports sum up the opposition to proportional representation:

"The principle of majority rule has been applied successfully by governmental agencies and embodied in laws of Congress. It was promulgated by the National War Labor Board created by President Wilson in the Spring of 1918. It has been followed without deviation by the Railway Labor Board, created by the Transportation Act of 1920. Public Resolution No. 44, approved June, 1934, contemplated majority rule in that it provided for secret elections. The 1934 amendments to the Railway Labor Act [so] provided: . . .

"And the rule is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.

"The object of collective bargaining is the making of agreements that will stabilize business conditions and fix fair standards of working

<sup>30</sup> S. Report No. 573 on S. 1958, 74th Congress, 1st Session.

conditions. Since it is well-nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees. Workers have found it impossible to approach their employers in a friendly spirit if they remained divided among themselves. Employers likewise, where majority rule has been given a trial of reasonable duration, have found it more conducive to harmonious labor relations to negotiate with representatives chosen by the majority than with numerous warring factions.”<sup>31</sup>

The House report, in part, read:

“The misleading propaganda directed against this principle has been incredible. The underlying purposes of the majority rule principle are simple and just. . . . There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to non-members of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given non-members, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties are paid according to different scales of wages and hours. Clearly, then, there must be one basic scale, and it must apply to all.

“It would be undesirable if this basic scale should result from negotiation between the employer and unorganized individuals or a minority group, for the agreement probably would not command the assent of the majority and hence would not have the stability which is one of the chief advantages of collective bargaining. . . .”

“In view of what has been said, it is apparent that those who oppose majority rule in effect oppose collective bargaining and the making of collective agreements as the end thereof by seeking to create conditions making such accomplishment impossible. Those who profess to favor collective bargaining and the general purposes of this bill should favor majority rule, which is the only practical method of achieving the desired ends. Majority rule is at the basis of our democratic insti-

<sup>31</sup> S. Report No. 573 on S. 1958, 74th Congress, 1st Session, pp. 13-14.

tutions. The same organized employer group who now oppose majority rule for workers have publicly announced their adherence to it as applied to the formulation of codes of fair competition. It has been the experience of the National Labor Relations Board in cases before it that employers opposing majority rule wished only to keep their responsibilities diffused and to maintain in the picture a complacent minority group, typically a company union, so that no collective agreement might be reached at all. This motivation has been brought to the surface in specific cases where employers refuse to recognize the rule when trade unions represented the majority, although in the course of the previous history of the disputes in question, when the opposing employer-promoted company unions had a majority, the employers had invoked the majority rule as the excuse for their refusal to deal with the same trade unions. . . ." <sup>32</sup>

It is true that strength may be diffused by the employer's dealing with small groups. But that the majority-rule principle does not care for minority interests is also true. The majority-rule principle is part and parcel of the American labor movement, where historically one union had hegemony over an employer area and the majority rule was a reflection of that hegemony. For the protection of the individual and his rights the principle of proportional representation is far superior, although generally it is unused because of the strength of organized labor and because of practical difficulties. But if democracy, which is to be promoted by the Act, is the protection of the minority as well as the will of the majority, then majority rule does not accomplish its purpose. The issue involves the same considerations as does the question "to join or not to join." <sup>33</sup>

Further, majority rule (more narrowly, the simple absolute majority rule) in labor representation is glorified because majority rule is said to be the rule of our political system and of our business system. The claim has been sustained by senators, representatives, the labor leaders, and Board members themselves. The analogy is false for such a rule may facilitate actual minority control or no minority representation. Any degree of realism and observation shows that our political representation is only partially based on simple absolute majorities. Our representative sys-

<sup>32</sup> H. Report No. 1147 on S. 1958, 74th Congress, 1st Session, pp. 20-23.

<sup>33</sup> *Supra*, Part II, Chapter VI.

tem is no example of the majority principle. Our system of presidential electors has often produced presidents not elected by a popular majority. The House of Representatives' political complexion is determined not only by how the people vote but in which district they vote. The Senate represents not even a theoretical majority.

In the business world the simple majority-rule myth is less pronounced. Business mens' decisions seldom result from mere bulk of numbers. In the field of corporate control, most often mentioned as analogous to majority rule in labor representation, there is often the majority rule operating as a legal technicality without any real operation of the principle. And even in corporate control the simple majority rule has very often been replaced by cumulative voting as a method to ascertain the majority preferences and to give the minority representation.

The majority rule recognizes that the employer might sign contracts with varying terms for the same job with different groups and thereby perhaps destroy the union. The majority rule must be used to bind the minority, for otherwise the employer might ascertain from the ballot the membership of different groups and discriminate against some groups. The use of the ballot contemplates a restriction on who may constitute an electorate; otherwise contracts would multiply and vary. The extreme result of no restrictions on the unit and the absence of majority rule would be individual bargaining. Unions, therefore, strongly insist upon the majority-rule principle because organization strength is promoted.<sup>34</sup>

If the majority rule is to be effective, once the majority is determined the individual should be and is restricted in the contracts embodying terms on wages, hours, and working conditions. By the Act the representative of the majority is the exclusive representative for all the workers in the unit; hence no contracts will be signed with individuals. There will be then no question of dis-

<sup>34</sup> The statement is only partly true because of the opportunistic tactics of unions. For example, the unit controversy (*infra*) and the run-off election controversy (*supra*) represent attempts to rig the majority-rule principle to achieve union objectives. Under Section 7(a) of N.I.R.A., the AF of L insisted that the Automobile Labor Board require employers to bargain collectively with their representatives. The AF of L then had only minorities in most plants. If the Board had applied the simple majority rule, the unions would have been driven out, hence the compromise on proportional representation.

crimination; or if there were discrimination in contract terms, there would be a violation of the discrimination proscription. The person who desires individual bargaining does not have his freedom of contract legally impaired. Statutorily, the employer may make no contract deviating from the collective agreement, and if he cannot legally deviate there is no impairment of freedom of contract. In a broad sense, of course, the employer's freedom of contract is restricted; but the restriction of contractual relationships is of the order of reasonable regulation designed to protect commerce against threatened strife. Practically, the situation for the individual worker is that he is not injured by finding his freedom of contract circumscribed by collective agreement. When he bargained as an individual he had the right to accept or reject the contract exactly as he does when there is collective bargaining in his unit.

## Chapter IX. THE APPROPRIATE UNIT

### A. General

The majority-rule provision of the Act presupposes that there is a bargaining unit within which the rule applies. Without such a unit there would be (1) no collective bargaining because there would be no concert among the workers; or (2) the employer would attempt to bargain by some method of proportional representation which, sophisticated labor students believe, often might mean playing groups against each other so that in fact the effects of collective bargaining would be destroyed. Therefore, a bargaining unit must be selected.

The employers could determine the unit, but such a determination would invite employer abuse and gerrymandering. The employees might determine the unit; but they, too, could gerrymander and set up all sorts of heterogeneous units with the limiting case of each worker's choosing himself as a unit. In any case workers cannot express a choice for a representative unless it is known who is eligible, and in part eligibility is a function of the unit. It is, therefore, apparent that logically the unit determination would rest with the Board and such provision is made:

"The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."<sup>1</sup>

Obviously, the Board was given full discretion to determine each case on its merits. Organized labor had insisted that this discretion be included in the law because of a fear that the em-

<sup>1</sup> See Appendix I, Section 9(b). The Section is operative in unfair labor practice cases where a refusal-to-bargain charge has been brought and in representation cases where representatives for the future are to be designated.

ployer might use the unit problem to defeat the Act. Too, the first National Labor Relations Board had been in conference much with Senator Wagner and had recommended Board determination of the unit on the ground that employers and employees were not impartially competent and the Board would be least likely to gerrymander.

The delegation of the task of unit determination to the Board was recognition that modern industry and labor demand flexibility in order that the law may be a living instrument. The task itself is not difficult of accomplishment when there are no rival organizations and when there are traditions, habits, and well-settled practices of collective bargaining. But the task is pronounced and the satisfaction is dubious when there are rival organizations in even an old industry long accustomed to collective bargaining, or in a new industry where no tradition or practice of bargaining exists.

### B. The Factors Determining the Unit

The Board has insisted that in the unit determination the facts of each individual case must describe the bargaining area. Such insistence makes difficult any organization of factors which are given weight in solving the problem, but by this approach the Board definitely is attempting to use the flexibility of the administrative process to insure the employees self-organization. The Board usually has accepted the unit if the parties stipulate, or agree in pleadings or in hearings, for the presumption is that the parties know their desires; but there is no ironclad rule, and the Board has refused to accede on occasions. Where there is no such agreement and the Board determines the unit, various factors are given weight—weight which can not be mathematically stated but which varies with the circumstances in each case. These factors can be grouped as those (1) relating to history and self-organization and (2) those relating to mutual interest.<sup>2</sup>

#### 1. History and Self-organization

One of the Board's important guides is the history of self-organization in the firms. If in the past some form has rendered

<sup>2</sup> Drawn chiefly from Third Annual Report, N.L.R.B., p. 156 ff.

collective bargaining successful, especially if a contract has existed, then that factor is important to the Board in the absence of evidence that changes in the industry or in the firm indicate need for a different unit. The history of bargaining in the industry generally is also considered as throwing light on what unit would best serve the objective of collective bargaining. The present form of self-organization is important because it somewhat expresses the desires of the employees. Past unsuccessful efforts at self-organization are accorded weight as indicative of employee desires, as in strike history, for strikes may show ties and homogeneity. Often unions will demand exclusion or inclusion of certain groups, and the eligibility of the questionable group for membership in the union will often be determinative. The Board usually reviews the rules of eligibility of unions seeking certification as bargaining representative because the membership rules may reflect the employee desires as to the unit. In view of the jurisdiction of unions,<sup>3</sup> however, Board determination of the unit on the membership rules alone might well be unjust.

The Board has always attempted to ascertain the desires of the employees themselves, but this became important only after the split in the labor movement.

## 2. *Mutual Interest*

Fundamental to any collective bargaining is the existence of mutual interest among the employees. The Board will join as a single unit only groups wherein a community of interest does appear to exist, though this policy may join different departments or even different plants separated geographically. The nature of the work is a leading element in determining the unit, though work differences do not necessarily overcome other factors which might make for mutual interest. The Board also considers wages and working conditions, manner of payment, and skill. Because skilled groups usually have different interests than do the unskilled, there is usually a basis for a different bargaining unit. The Board will not permit different groups to combine into one bargaining unit if the only common denominator is skill but will hold that each group is a separate unit.

<sup>3</sup> For example, the United Brotherhood of Carpenters accepts as members all who work with wood or wood substitutes.

Foremen and supervisory employees are ordinarily excluded from the unit. Such an exclusion demands a definition of supervisors and foremen; and the Board places in that category those having power to hire and discharge, change wages, apportion work, discipline workers, maintain productivity, or to recommend such action. The assumption is that supervisory employees have interests which differ from those of nonsupervisory employees. It is sometimes difficult to define the supervisory employees, but the Board relies upon the interests of the group under consideration and considers all the evidence possible which would indicate the proper category for the employees. Minor supervisory employees are ordinarily included if all parties so agree; but any request for exclusion will cause the Board to exclude them, or the Board may do so if such employees appear close to management.<sup>4</sup>

The Board usually excludes office and clerical employees from the production and maintenance group. Office employees have been excluded even where the one petitioning union requests their inclusion in the unit. Clerical employees may be included in the unit if there is only one union and it so requests, but they are excluded where there are two unions if either union so desires. Salesmen and other white-collar workers are normally excluded unless they are eligible for membership in the union. Technically trained employees are excluded from the unit, and so are watchmen and guards unless all the parties agree to inclusion. The Board will grant a union request that production and maintenance workers be separated if there is a substantial difference in the work. Likewise, where the union requests, the shipping-room and receiving-room employees will be excluded from the unit. Temporary and casual employees are included if they work sufficiently to have a community of interest with the regular workers. Part-time employees who are regularly employed, and seasonal workers, are included in the unit.

It may be emphasized that generalizations as to inclusion or exclusion of certain groups of employees in a unit are hazardous. The Board determines each case in light of the circumstances, and almost every firm offers a unique organization and relationship of

<sup>4</sup> A minor supervisory employee would be a group leader or subforeman who has the power to recommend hire and discharge but who does production work the same as nonsupervisory employees.

employees. The Board's objective is to extend the ballot privilege to labor, not management; and its decisions are characterized by such objective.

In mass-production industries the Board often finds that different departments have functional coherence and interdependence, and the different production and maintenance employees may be included in one unit. Interdependent plants make for a single unit; and interdependence, as an important factor, is found where, as in radio and telegraph, the whole system or nation may be described as a unit. A complete absence of functional coherence or interdependence will make for separate units. The finding of the multiple-plant unit depends on the facts of each case, and the Board makes its determination in light of how best to promote collective bargaining. For example, if a union has a majority in two plants out of five and it requests a plant unit, the Board will so hold even though the employer requests an employer-wide unit. The Board reasons that the employees in the two plants should not be deprived of bargaining rights because the other three plants are not organized. However, if the union has organized to such an extent as to request an employer-wide unit, the Board will ordinarily grant the request. Obviously the union will request the unit which will best suit its purposes, and if the employer is opposing the union he will seek the unit which will best serve his purposes.

Sometimes the Board is requested to find a unit composed of several employers—that is, the multiple-employer unit. Different companies which are commonly owned and operated are treated as one employer, and the unit is determined by the different factors mentioned above. Where there are independent and competing companies, the Board groups them into one unit if there is an experience of multiple-employer bargaining and if machinery exists to make binding agreements for the employer members.

In summary, the Board views the circumstances in each case and gives weight to the following factors: the history of bargaining and self-organization in the firm and industry; the form of self-organization in the firm and industry; the eligibility of the employees for union membership; the desires of the employees themselves; mutual interest as indicated by the nature of the

work; skill; wages and working conditions; whether employees are supervisory or nonsupervisory; whether the employees are permanent, temporary, part-time, or seasonal; whether functional interdependence and functional coherence exist; geographical conditions; whether employees are clerical, watchmen, or other employees; and whether mutual interest bridges different companies. With such an array of factors and such careful consideration by the Board one would expect praise to be rendered; but only abuse and recrimination have descended, and the abuse came because the Board, through its power to determine the unit, affects the form the labor movement is to take.

### C. The Appropriate Unit and Organized Labor

The appropriate unit became a source of criticism of the Board after the AF of L and CIO conflict brought a schism in the labor movement. The Board had adopted the principle of refusing to enter jurisdictional disputes on the theory that such disputes were an internal problem for labor to settle with its own governing body. In the course of its decision establishing policy, the Board said:

" . . . In its permanent operation the Act envisages cohesive organizations, well-constructed and intelligently guided. Such organizations will not develop if they are led to look elsewhere for the solutions to such [jurisdictional] problems."<sup>5</sup>

The AF of L suspended ten of its international unions in September, 1936; and this meant that the Board, in deciding the appropriate unit, would probably become subject to AF of L and CIO criticism. The Board's attitude was that in reality the suspended unions did not accept the authority of the AF of L; and the Board, therefore, had to regard CIO unions as organizations competing with AF of L affiliates.<sup>6</sup> This turn had not been foreseen when the Act was being debated for passage, and the AF of L had anticipated Board determination of the unit only when the employer and the union could not agree. Because, then, the

<sup>5</sup> *Matter of Aluminum Co. of America*, 1 N.L.R.B. 530.

<sup>6</sup> The first decision in which the Board took this position was the *Interlake Iron Corp.* case, 2 N.L.R.B. 1036, decided June 26, 1937.

Board did what it regarded as its duty under the law, William Green wrote:

"The Board has given an insurgent group the rights of belligerents. . . . Every agency of Government that gives status to the CIO gives the same recognition. Surely this is not freedom for workers to choose their own unions and representatives for collective bargaining, but union development under Government patronage."<sup>7</sup>

Nevertheless, the growth of the CIO into a labor organization of stature validated the only decision that the Board rightly could have made. The AF of L, when it sensed that such Board determinations added to its difficulties, began to demand amendments to the Act.<sup>8</sup> This demand must be regarded as a defensive measure to enable the AF of L to maintain its position in the labor movement, but the demand was important because it was eventually to aid in a portrayal of the Board as an unfair governmental agency.

### 1. Basis of AF of L Criticism

The AF of L never charged that the Board caused the dualism in the labor movement; but the AF of L charged that Board decisions widened the breach, apparently because the decisions indirectly strengthened the CIO. The AF of L "unit" criticisms of the Act and the Board relate to: (a) one employee constituting a unit; (b) the craft and industrial unit; and (c) the multiple unit.

(a) *The One-Employee Unit.*<sup>9</sup> The AF of L has charged partiality on the part of the Board partly because the Board has held that one individual cannot constitute a bargaining unit. In

<sup>7</sup> Editorial in the *American Federationist*, Vol. XLV, No. 8, p. 802, Aug., 1938.

<sup>8</sup> In the *Report of the Executive Council of the American Federation of Labor to the Fifty-seventh Annual Convention*, Denver, Colo., Oct. 4, 1937, the Council was not yet asking for amendments; rather, the report conveys a subtle threat to the Board to rely upon elections to determine representation, to cease mediation and conciliation activities, and to remain impartial. See pp. 60 ff. of the Report. At the 1938 Houston Convention the AF of L demanded amendments. S. Hearings on N.L.R.A., pp. 618-627. Between the 1937 and 1938 AF of L Conventions, an AF of L and CIO "peace conference" failed. By 1939, the AF of L criticism condemned the Act, the Board, and the personnel.

<sup>9</sup> See AF of L testimony, H. Hearings on N.L.R.A., Vol. III, pp. 863-867, and N.L.R.B. testimony, same volume, pp. 1064-1067.

the *Luckenbach* case<sup>10</sup> the situation arose where there was one person eligible to vote. The Board refused to certify the one man as a bargaining representative on the grounds that the principle of collective bargaining presupposes more than one person. The Board further said that the single person could designate a representative to act for him and that the Act did not change his status in that respect. The Board, however, held that it was not empowered to certify except for "collective" bargaining. This decision ran counter to AF of L practice, where often there is but one union man in a firm and the union bargains for him. So to the AF of L the issue was whether or not an AF of L affiliate could bargain for one member, and it objected that such a definition by the Board placed too much stress on the etymological aspects of "collective."

In the *Schick* case<sup>11</sup> the question arose as to whether an individual could be regarded as a bargaining unit, and the Board followed the *Luckenbach* case. But the Board also said that in the case of a single craft worker he could indicate at the election whether he desired to join an industrial unit for bargaining purposes. Thus, with these two cases the Board had held, first, that the single employee could have representation even if he could not be certified as the bargaining agent (unit); then, that he could choose whether he would join an industrial unit for purposes of representation.

The next development came in the *Finch* case,<sup>12</sup> where a lone carpenter voted for separate craft representation. The Board, upon reconsidering the *Schick* decision, held that ". . . The desires of a single employee should not be determinative as to his

<sup>10</sup> 2 N.L.R.B. 181. Eighteen shipping companies were involved in the case. The Board's direction of election defined the unit, for each company, to be composed of watchmen, baggagemen and porters, storemen, garmen, linemen, sliders, janitors and sweepers, inventory clerks, dock and ship oil pumbers, and handymen. In each of three companies, there was only one person eligible; and each person desired the union to represent him.

<sup>11</sup> 4 N.L.R.B. 246. A separate election had been ordered among each of the crafts to determine whether the workers desired to be represented by a craft council, with craft lines kept intact, or whether the workers desired to join the industrial unit. The Board held that one carpenter, who was a craft worker, could not constitute a bargaining unit.

<sup>12</sup> 10 N.L.R.B. 896. The Board had directed that the carpenters should vote whether they should have separate bargaining status, but there were five carpenters employed when the direction of election was issued and only one when the election occurred.

inclusion in or exclusion from a bargaining unit. . . . We conclude that the carpenter should be included in the unit with the production and maintenance employees . . ." <sup>13</sup>

The *Finch* decision enraged the AF of L; and charges of bias, prejudice, and ignorance of union methods were brought by the Federation.

In a later decision handed down in January, 1940, in a case involving the *Consolidated Steamship Co. and Port of Los Angeles Stevedoring and Ballast Co.*, a petition for investigation of representatives was dismissed by the Board because only one employee was involved and no representative could be certified. The Board here, however, added in a footnote that the single employee might designate a representative to act for him since he had that right without the Act and it in no way was limited by the Act.<sup>14</sup>

As any decision may injure a minority, the *Finch* decision would injure an AF of L union which had but one member in a plant. If he is merged with others, an AF of L affiliate can no longer bargain for him; and the AF of L argument that such bargaining practice is collective bargaining is sound in principle. Often a small plant exists where an engineer, for instance, is a member of a "craft" union. The union deals with the employer of that one employee and often has an agreement which is standard in the locality for other similarly situated employees and employers. Justifiable opposition, then, is to be expected from the AF of L in the sense that the long-time labor philosophy and practice have been to control the job and sign such agreements. Such a decision as in the *Finch* case would result in injury, dismemberment, and destruction of AF of L locals, for by such a policy the Board could drive membership from one union into another and thereby shape the direction of the labor movement, a possibility greatly feared by the AF of L. This could happen by the lone individual's yielding to pressure to join the CIO union and forsaking his AF of L affiliation, since the CIO would do the bargaining. Or, of course, if the CIO obtained a closed-shop contract, he would of necessity join the CIO union. Apart from the defensive position of the AF of L in this circumstance, the Board may have at first

<sup>13</sup> Chairman Madden dissented from E. S. Smith and D. W. Smith. Mr. Madden thought the Board should have followed the rule of the *Schick* case.

<sup>14</sup> N.L.R.B. Press Release R-2489.

paid too little regard to union method. The Board had applied local option and then departed from it when only one person voted in the craft. As Chairman Madden indicated, the majority decision was an error, which was a disturbing precedent to the AF of L. The AF of L's reflex was probably out of proportion to the importance of the case, but the AF of L was defending the *status quo* and feared precedent. Hence, the refusal of the Board majority to let the lone carpenter indicate whether he desired the industrial unit to bargain for him opened wide the door of criticism.

The Board may not be cited for bias on the record of one-employee-unit determinations. In the *Matter of Metro-Goldwyn-Mayer*<sup>15</sup> the same principle was applied where the union involved was unaffiliated. In the *Matter of Trawler "Maris Stella"*<sup>16</sup> the principle was applied where the union was an affiliate of the CIO. If, therefore, the charge of bias is dismissed because of insubstantiation, there is left the question of whether the Board's definition of collective bargaining was wise in view of union experience, union method, and demonstrated craft characteristics.

It is true that the alternative decision could well have been that each individual would constitute a unit and individual bargaining might result. But the Board was not faced with the necessity of a "yes" and "no" type of answer. Surely the Act does presuppose more than one person in a bargaining unit in order to select a representative, and the Board should have refused to certify the unit requested. But the single "craft" worker should not have been included, against his desires, in the industrial unit. The *Finch* case decision appears erroneous, although this has now been corrected by the holding in the *Consolidated Steamship Co.* case (*supra*), where the individual could still designate a representative to act for him.

(b) *The Craft Unit v. the Industrial Unit.* The leading reason that motivated the AF of L to press for amendments to the Act was the alleged bias of the Board in favor of industrial unionism, which it was claimed would destroy the structure of the AF of L. The Board, in relying upon flexibility, quite obviously had the power to freeze out craft units in favor of industrial units; and to

<sup>15</sup> 7 N.L.R.B. 662, and 8 N.L.R.B. 858.

<sup>16</sup> 12 N.L.R.B. No. 50.

the AF of L the issue was whether the "skilled" workers would lose their "craft" identity or would be permitted to vote on the form of union they desired for collective bargaining. The AF of L charged partiality by the Board members for the CIO, and the amendments offered by the AF of L were designed to insure the AF of L's position in the labor movement by removing all possibilities of "arbitrary" action by the Board.<sup>17</sup>

As has been indicated, the Board considers different factors in determining the appropriate unit. Ordinarily if there is a well-defined craft and it seeks separate representation, the Board grants such a request; but ". . . where the considerations are so evenly balanced, the determining factor is the desire of the men themselves,"<sup>18</sup> or at least this was true until Mr. Leiserson became a Board member in 1939. That is to say, where the Board could logically find a craft unit or a plant unit, it applied the so-called *Globe* doctrine and let the workers themselves determine, by election or otherwise, which form of union they desired for representation.<sup>19</sup>

As a prerequisite for application of the *Globe* doctrine, the Board has insisted that there be such a showing by a group for separate representation that doubt is cast as to the preferences of the majority of the group. The Board never regarded itself as possessed of sufficient power to carve out separate units—that is, the Board did not apply the *Globe* doctrine if the craft union had no members, or if the union never attempted to organize, or if the men historically had never been considered a craft group, or if the function performed could not be regarded in the nature of a craft. Nor would the Board entertain the claims of a craft union where the employer aided the establishment of the craft.

<sup>17</sup> H. Hearings on N.L.R.A., Vol. III, pp. 741-790.

<sup>18</sup> *Matter of Globe Machine and Stamping Co.*, 3 N.L.R.B. 294 (August, 1937).

<sup>19</sup> An election was not always held. For example, during the fiscal year ending June 30, 1939, the Board held ten elections under the *Globe* doctrine, and the doctrine was applied in nine other cases where the Board determined the employees' desires at a hearing. Fourth Annual Report, N.L.R.B., p. 86, footnote 58.

Nor was the doctrine limited to the craft or plant unit. It is also applied, for example, in cases involving firms rendering different classes of services. In *Matter of Wilmington Transp'n. Co.*, 4 N.L.R.B. 750, the Board applied the doctrine to settle the question whether the unlicensed personnel on tugs and barges operated by the company should be included with the unlicensed deck personnel on the company's freight and passenger ships.

The AF of L specifically objected to the unit determination by the Board on the following grounds:<sup>20</sup>

(1) Board member Edwin Smith dissented from the majority in the application of the *Globe* doctrine on the grounds that the Board had the power to determine the unit without regard for the employees' desires, and the power should be exercised preferably by merging the crafts with the larger unit. (2) The determination of the unit was to Edwin Smith a judicial function which only the Board could exercise. (3) The *Globe* doctrine was a sham, and the "balanced considerations" were a conglomeration of diverse rules which serve as a Board excuse to refuse the craft units their freedom of choice. (4) The Board looked upon the *Globe* doctrine as a privilege extended and not a right, and the application of the *Globe* doctrine was subject to Board discretion. (5) The intent of Congress was to give the men freedom of choice as was given in the Railway Act. (6) Edwin Smith "swayed" Board member Donald Wakefield Smith to Edwin Smith's own point of view, which favored the CIO. (7) The Board decisions established precedents whereby the economic philosophy of one labor group was sustained and fostered while that of another was discouraged and suppressed.

The Federation proposed an amendment "identical" with the New York Act. The amendment would permit a separate unit if there were one or more craft workers and they desired separate representation; that is, the *Globe* doctrine would have been mandatory whenever any one "craft" person or group so demanded, regardless of experience, contracts, or other forms of organization.<sup>21</sup> Administrative discretion would thereby be abandoned in favor of "self-determination," which would conceivably lead to many units and bargaining chaos. Moreover, it probably would not have solved the problem since the Board would have to define what constituted a "craft" and who was in it. This would be the same problem in different clothes, for even the AF of L admitted and agreed that the Board would have discretion to define the craft, although once the craft was defined the AF of L amendment would require a vote. Since the Board, under the

<sup>20</sup> S. Hearings on N.L.R.A., Parts 4, 5, and 6.

<sup>21</sup> H. Hearings on N.L.R.A., Vol. III, pp. 756-773.

*Globe* doctrine, held an election where there were craft characteristics and doubt as to the unit, an amendment would be superfluous unless it were to restrict administrative discretion; and this would be undesirable. The real task is to describe the area from which representatives are to be chosen, for the men choose the representatives themselves.

There is no evidence that the Board was biased or prejudiced against the AF of L, although Board members disagreed in specific cases. Indeed, the *Globe* doctrine is itself favorable to the "craft" units, and the Board applied the doctrine when there was any doubt as to the unit. In the Senate and House hearings on the proposed amendments, the AF of L presented no case which convincingly indicated any dereliction by the Board in certification of the unit where there were rival organizations.<sup>22</sup> Yet it was the presentation of such cases that was meant to establish the Board's unfairness toward the AF of L, a claim that the statistics do not bear out:<sup>23</sup>

*Unit Issues Involving Both AF of L and CIO Unions  
to December 1, 1939*

Total cases decided by the Board in which both AF of L and CIO unions participated where the question of the appropriate unit was involved 301

A. Cases in which there was agreement between the AF of L and CIO on the unit	187
(a) Complete agreement	131
(b) Substantial agreement	56
B. Cases in which there was important disagreement on the unit between AF of L and CIO	114*
(a) AF of L contention upheld	51
(b) CIO contention upheld	45
(c) Contentions of each in part upheld	14
(d) No decision necessary	2

\* *Globe* elections were ordered in two cases.

The CIO has also criticized the Board, but not on a prejudice and bias basis. The CIO took the position that such an amend-

<sup>22</sup> This judgment is based upon the testimony presented by the AF of L and the answers and presentation of cases by the Board's general counsel.

<sup>23</sup> Smith Hearings, Vol. II, No. 11, pp. 381-382 (*sic.*)

ment as that proposed by the AF of L would permit individual members, or small groups belonging to an AF of L affiliate, to demand and receive a separate bargaining unit. The CIO argued that there is nothing in the law that permits the Board to carve a craft unit out of an industrial unit, that a conglomeration of separate crafts would mean an impossible situation for the employer in bargaining, and that the CIO would have to spend all of its energies opposing the AF of L, a likelihood not socially desirable. The CIO claimed that it did not desire to freeze out established craft unions where they had a history of bargaining; but the CIO insisted that where there was historically an industrial unit, the Board had no power or right to carve out a craft unit. The Board, charged the CIO, had disregarded the presence of the industrial unit with a history of collective bargaining and thereby permitted crafts to enter unfairly whenever they could get a few members together.

But the more fundamental opposition of the CIO referred to the *Globe* doctrine itself.<sup>24</sup> Despite its reluctant acceptance of the *Globe* doctrine if properly administered, the CIO objected to the doctrine on the grounds that the Board thereby abdicated its responsibility, since under the Act the Board was to determine the unit, not workers in the craft affected. The Board, it was claimed, ignored the question whether the workers in the industrial unit or those in the craft unit should make the decision; and the policy of permitting the craft workers to make the decision breaks down majority rule for other workers and permits a secession movement of minority groups. Thus, to the CIO it was a question of secession v. unity, and the CIO favored unity.

Chairman Madden often stated that the *Globe* doctrine applied only when the group had craft character, and an experience of bargaining was regarded as an excellent indication of such character. But it was the opinion of Chairman Madden that the desires of employees should determine the unit, even in the absence of a substantial bargaining history. To Mr. Madden, if there was a "recognized" craft, the workers alone should make the unit decision.<sup>25</sup> Among the Board members themselves there was disagreement as to when a group possessed craft character;

<sup>24</sup> S. Hearings on N.L.R.A., Part 22, pp. 4265-4276, 4339-4344.

<sup>25</sup> See his dissent in *Matter of Joseph F. Finch Co., Inc.*, 10 N.L.R.B. 896.

and this, in the final analysis, is a matter of administrative judgment.

(c) *The Multiple-Plant Unit.* If the CIO has organized five of an employer's six plants and the AF of L has organized the sixth, the CIO would be likely to ask that all six plants be certified as the unit. The AF of L, in opposition, would argue that such a certification would be unfair and an abuse of discretion since the men in the sixth plant should have the right of "self-determination." The employer, who has no voice in any event, would approve or disapprove the Board's finding, depending upon where his sympathies lay. If the sixth plant were not all organized, he would probably argue that each plant, or no more than the five plants, should be certified as the unit. Both the CIO and AF of L ask for the unit that will best serve their immediate purpose, which is always either to maintain the *status quo* or to be certified as representatives over a larger area. The AF of L criticism is that the Board acted arbitrarily and indiscriminately in throwing plants together in order to aid the CIO.

The record does not support the AF of L charge. For example, the *Lund* case,<sup>26</sup> initiated by the AF of L itself, involved the same unit issue; and the Board found that commonly controlled companies would constitute a bargaining unit where there were similar operations in plants, transfer of workers between plants, similar work in each plant, no appreciable wage differentials existing, a similar labor policy at each plant, a unity of interests between the two plants, and where the plants were in fact operated as one unit even though in different cities.

A complaint that an employer has refused to bargain always necessitates a Board finding as to the unit; and since unfair labor practice cases are reviewable, the Supreme Court, in such an instance, has passed upon the constitutionality of the Board's power to determine the unit. In the *Pittsburgh Plate Glass Co.* case,<sup>27</sup> the CIO had organized five of the company's six plants; and the union charged unfair labor practices in the sixth plant, where the Board had previously found company domination of a union and issued a cease and desist order. Should the unit be composed of

<sup>26</sup> *Matter of C. A. Lund Co.*, 6 N.L.R.B. 423. The Board was sustained by the court in *N.L.R.B. v. C. A. Lund et al.*, 103 F. (2d) 815, CCA-8.

<sup>27</sup> 15 N.L.R.B. No. 58.

five plants, or of six? The Board held for six on the bases of promoting harmony; comparable wages, hours, and working conditions; more equality of bargaining power; historical attempts by the labor organizations for an employer-wide unit; past contracts on an employer-wide basis; the fact that the labor conditions of different plants were related; and unfair labor practices by the employer at the plant that did not have a majority of its workers organized in an independent union. Board member Leiserson dissented on the grounds that the Board had no power to fix bargaining units as it wished and that the union representing five plants should not be imposed upon the sixth without a vote of the workers therein.

When the case reached the Supreme Court, the central issue was the legality of the Board's finding that the six plants of the company should constitute the appropriate unit. The petitioners urged upon the Court "that the standards for Board action as to the appropriate unit are inadequate to give a guide to the administrative action and the result is necessarily capricious, arbitrary, and an unconstitutional delegation of legislative power."<sup>28</sup> The Court, however, found adequate standards, since the Board's power to find the unit was limited to the area covered by "employer," "craft," and "plant"; and an additional standard was that the Board was required to find a unit which would effectuate the policy of the Act. Since the policy of the Act was so elaborate, held the Court, such a "requirement acts as a permitted measure of delegated authority."<sup>29</sup> Moreover, for this particular case the Court found the evidence to be sufficient to justify the Board conclusion that a multiple-plant unit was appropriate.

(d) *The Multiple-Employer Unit.* The AF of L opposes the Board's finding units which combine several employers. The AF of L's theoretical position is that such bargaining is proper if each employer's group has voted to become a part of the larger unit (*Globe* doctrine) but that otherwise the Board acts beyond its authority and abuses its discretionary powers. The AF of L supported amendments which would limit the unit to one employer, except that by voluntary consent the units could bargain

<sup>28</sup> *Pittsburgh Plate Glass Co. v. N.L.R.B.* and *Crystal City Glass Workers' Union v. N.L.R.B.*, 313 U. S. 146 (1941). The Court had treated section 9(b) as valid in several preceding cases.

<sup>29</sup> *Ibid.*

through the same agent.<sup>30</sup> Such an amendment would not render industry-wide bargaining impossible, but it would make such bargaining more difficult. The CIO, existing through large units, demands that the Board's power to certify industry-wide units be uncurtailed.

The *Longshoremen's* case illustrates the AF of L position and the Board's treatment of the problem.<sup>31</sup>

In 1934 the AF of L affiliate, which had organized longshoremen, called a strike on the Pacific Coast. Among other concessions, it demanded the coast-wide bargaining which the AF of L had been seeking. Eventually, in 1937, the AF of L coast-wide demand was met by the employers' association, which did the bargaining for the employers. Shortly thereafter the preponderant majority of longshoremen changed their affiliation to the CIO, some 10,575 joining the CIO and 904 remaining in AF of L locals. The 904 were concentrated in four ports, where the AF of L had a majority. The employers' association renewed the 1937 agreement with the CIO for all except the four ports but refused formal recognition of the CIO. The CIO, in January, 1938, petitioned for a certification of representatives; and the Board was confronted with the unit determination.

In view of the coast-wide bargaining established by the employers and the union in 1934, the fact that employers dealt through an association, the fact that wages, hours, working conditions, and grievance procedure were uniform on the Pacific Coast, the Board found that all Pacific Coast longshoremen who worked for members of the employers' association constituted the appropriate unit. Cards introduced in evidence showed that 9,557 of a total of 12,860 longshoremen had designated the CIO union, and therefore it was to be the exclusive representative.<sup>32</sup> It is to be emphasized that the Board did not fix the unit to include all employees and employers of the Pacific Coast, as the AF of L claimed.

What the Federation obviously desired was to defend its own

<sup>30</sup> See H. Hearings on N.L.R.A., Vol. III, p. 759.

<sup>31</sup> Material on the *Longshoremen's* case is drawn chiefly from the Board's brief before the Supreme Court in *American Federation of Labor et al. v. N.L.R.B.*, 308 U. S. 401 (1940).

<sup>32</sup> Nine thousand, five hundred and fifty-seven were CIO members. Of the 3303 others it is impossible to say how many belonged to the AF of L, but even if 3303 were members the ratio would still be almost three to one.

position.<sup>33</sup> Despite AF of L fear of industry-wide bargaining, there is no evidence that the Board is heading for compulsory industry-wide bargaining, although that is certainly the trend of unionism in the United States and the Board has reared no obstacles to the trend. But the employers' association is taken as a unit only where, before the Board entered the scene, there had been an association dealing with employees organized into a union. Even then an association is not held the proper unit merely because of a request. The facts of each case determine. The *Longshoremen's* case was not an instance of the Board's "creating" a unit, for experience had settled that issue, but an instance of the Board's decision either continuing or destroying union-association bargaining. No contracts were destroyed by the board, for only the coast-wide contract existed; and no AF of L locals were destroyed, although they did lose their exclusive bargaining rights.<sup>34</sup> Moreover, the AF of L itself in several instances has requested the Board to certify a unit composed of more than one employer.<sup>35</sup> Indeed, the Federation admitted the logic and advantages of industry-wide bargaining and agreed that the industry-wide unit would be ideal were there no split in the movement. But, argued the Federation's general counsel, the argument no longer applies when there are two organizations. Apparently the Federation regards the advantages of such bargaining as redounding only to labor, which is false, for employers, too, enjoy advantages from an industry-wide unit. The real issue was again the Federation's opportunistically defending jurisdiction, and this assertion is verified by the Federation's brief before the

<sup>33</sup> The AF of L admitted that coast-wide bargaining had been desirable prior to the entrance of the CIO. But with competing movements the AF of L desired each port group to decide for itself who should be its representative. The AF of L feared that the decision meant that compulsory industry-wide bargaining would follow such a Board policy. S. Hearings on N.L.R.A., Part 6, pp. 1029-1042.

<sup>34</sup> The locals are, however, in an extremely vulnerable position in such a case. A closed-shop agreement would destroy them. But this situation is identical in principle with the closed-shop issue where a minority opposes the closed-shop, yet the AF of L has always supported the closed-shop. Here the AF of L apparently was faced with contradicting its own principle as a defensive measure under the name of "self-determination." The real problem is again one of minorities.

<sup>35</sup> For example, *Matter of Mobile Steamship Ass'n.*, 8 N.L.R.B. 1297; *Matter of F. E. Booth and Co.*, 10 N.L.R.B. 1491; *Matter of Hyman-Michaels Co.*, 11 N.L.R.B. 796; *Matter of Motion Picture Producers and Distributors*, 15 N.L.R.B. 28-A.

Supreme Court in the *Longshoremen's* case.<sup>36</sup> There the AF of L contended that the constitutionality of the Act would be endangered if the Board's interpretation of its power to certify multiple-employer units were upheld, because the Board's certification was a judicial interpretation affecting the property right of the AF of L to represent the longshoremen.

#### D. Congressional Intent and the Appropriate Unit

Throughout its attempt to amend the Act so as to prevent multiple-employer units' being discretionary with the Board, the AF of L argued that the Board had no authority to lump two or more employers together. The Board argued, and was upheld in the *Lund* case,<sup>37</sup> that Section 9(b) gives it the authority to determine the employer unit and that this Section, taken in conjunction with the statutory definitions, clearly authorizes more than one employer in the unit. Section 2(2) defines "employer" to include "any person acting in the interest of an employer," and Subsection 1 of Section 2 defines "person" to include "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."<sup>38</sup>

Because the Supreme Court has held that, under the terms of the Act, unit determinations alone are not subject to court review, the multiple-employer unit holding under the definitions has never been passed on by the highest judicial authority. It is clear Congress did not intend that there be court review of a certification (except when accompanied by an order), but from the language of the Act it is not clear as to congressional intent on the unit. The AF of L, and congressmen, have argued that, by a skillful juxtaposition of terms, the Board has usurped the power to certify multiple-employer units. It is a maxim that when the language of a statute is not clear, reliance is placed next on congressional intent; and a reconsideration of congressional intent here discloses an interesting example of legislative strategy. There is also here indicated the power of the small Senate group in the passage of the bill and the generally inadequate study

<sup>36</sup> Brief of AF of L, pp. 24-29, before the Supreme Court in *American Federation of Labor et al. v. N.L.R.B.* 308 U. S. 401 (1940).

<sup>37</sup> *N.L.R.B. v. C. A. Lund et al.*, 103 F. (2d) 815, CCA-8.

<sup>38</sup> See Appendix I, Section 2(1), (2), (3).

and consideration given to the proposed Act by the Congress.

As Senator Wagner introduced the bill and as it came from the Senate committee and was passed by the Senate, Section 9(b) read "employer unit, craft unit, plant unit, or other unit."<sup>39</sup> This, together with the statutory definitions and Senator Wagner's wide experience, lead to the belief that the Senate certainly intended to give the Board broad discretion. The belief is substantiated by the definition of "employee," which specifies that the term is not limited to "the employees of a particular employer." Too, the Senate report indicated that, at least in part, the definition of "employee" grew out of the practice of some labor organizations' bargaining with associations of employers; and the report read:

"The term employee is not limited to the employees of a particular employer. . . . [Because:] Under modern conditions employees at times organize along craft or industrial lines and form labor organizations that extend beyond the limits of a single-employer unit. These organizations at times make agreements or bargain collectively with employers, or with an association of employers . . ."<sup>40</sup>

The House Report on the bill, discussing definitions, read in part:

". . . It is imperative that employees be permitted . . . to organize, and that unfair labor practices taking in workers and labor organizations beyond the scope of a single plant be regarded as within the purview of the bill."<sup>41</sup>

Some members of the House, as evidenced by the debates, understood that the original bill provided that the unit could include more than one employer.<sup>42</sup> Representative Taber even offered an

<sup>39</sup> Congressional Record, 74th Congress, 1st Session, pp. 2369, 7672, 7681. Italics supplied.

<sup>40</sup> S. Report 573 on S. 1958, 74th Congress, 1st Session, p. 6. Italics supplied.

<sup>41</sup> H. Report 1147 on S. 1958, 74th Congress, 1st Session, p. 10.

<sup>42</sup> MR. TABER: "Here is the situation: If they fix the unit of bargaining so that it covers the gentleman's factories as well as the others, the result of the bargaining will be binding on them."

MR. CONNERY: "The gentleman is misinformed. . . . The purpose of that amendment is when they have an election in a plant and there are three or four different sorts of unions, or nonunions, the Board may settle which one will be the collective bargaining unit."

Congressional Record, 74th Congress, 1st Session, p. 9710.

extreme amendment to strike out all of the section which would authorize the Board to determine the unit.<sup>43</sup> Another amendment by Representative Ramspeck, of Georgia, who was to be a member of the Conference Committee, would limit the unit to one employer.<sup>44</sup> Representative Connery protested that such an amendment would handicap collective bargaining in the coal industry, but Mr. Ramspeck's answer was that each unit could certify the same unit for bargaining and thereby industry-wide bargaining could be carried on. Other members of the House argued against the amendment on the grounds that the open-shop and the destruction of all collective bargaining would result. But the amendment carried, 127 to 87. The bill went to the Conference Committee, and when it came out it had been "compromised" by the dropping of both "or other unit" and the Ramspeck amendment. The Senate adopted the Conference bill without debate, but there was debate in the House. Mr. Ramspeck said:

"We have worked out a *compromise* with reference to that [Ramspeck] amendment which accomplishes, in my opinion, exactly the object I had in mind, which is to limit the jurisdiction of the Board in setting up units appropriate for collective bargaining, to plant units, craft units, or employer units, the employer unit being the largest constituted."

". . . The Board certainly could not go out and take a group of factories, say five factories in [one] city, four of which were organized and one of which had declined to organize—and put them all into one unit and force in the employees of the fifth factory against their will."

MR. TABER: "They could, however, put in all those who belonged to the same craft?"

MR. RAMSPECK: "It is possible that they might do that, although the Labor Board representative tells me that they do not think that they would do that."<sup>45</sup>

It is certainly not clear from the record whether the House fully understood the unit provisions. Mr. Ramspeck evidently thought the Conference bill would not permit multiple-employer units; and he apparently believed that, though his amendment was

<sup>43</sup> Congressional Record, 74th Congress, 1st Session, p. 9727.

<sup>44</sup> Congressional Record, 74th Congress, 1st Session, pp. 9727-9728. Also see p. 9710.

<sup>45</sup> Congressional Record, 74th Congress, 1st Session, p. 10299. Italics supplied.

dropped, the dropping of the "or other unit" phrase would not permit the Board indiscriminately to group together plants and employers, willing and unwilling employers and employees. Mr. Madden has pointed out that Mr. Ramspeck accomplished his objective, for multiple-employer units are now possible only through the definitions, which is to say that the Board designates such a unit only when there exists already an association for collective bargaining purposes and voluntary agreement to the association by the employer. Moreover, the Board insists that the association have the power to bind the employer.<sup>46</sup> Yet, Mr. Ramspeck has been an open critic of the Board's unit approach. With regard to the *Longshoremen's* case, Mr. Ramspeck said:

" . . . The thing I am interested in is that the decision perverts the whole purpose of this Act in that it denies to a group of workers their right of self-determination. Congress fixed the unit beyond which you could not go, which was the employer unit. The Board has disregarded that by, in my judgment, misinterpreting the definition of the term 'employer' to include an association, which did not, and never attempted to exercise the functions of an employer. It was simply a negotiating agent. The purpose of that definition, as I understand it, was to make any agent of an employer liable under this Act for his conduct, not to affect the bargaining unit, in Section 9(b), where we had the amendment and the discussion of the intent of Congress. That is my viewpoint."<sup>47</sup>

Later (February 4, 1940) Mr. Ramspeck further said:

"Let me point out a little history about this thing. When the Act was on the floor of the House I amended Section 9(b) for the direct purpose of limiting the unit to the employees of one employer. Now the Board and their brainy legal staff over there have circumvented the intention of Congress by virtue of the fact that they say the employer is defined to include anybody acting for the employer, and therefore when an employer is organized in an association they desig-

<sup>46</sup> Smith Hearings, Vol. II, No. 15, pp. 636 ff. The AF of L has charged that this results in employer determination of the unit. The Board, however, follows the desires of both employees and employers and considers all factors. To the Board, the association is only a "condition precedent," and a unit does not of necessity follow.

<sup>47</sup> H. Hearings on N.L.R.A., Vol. III, pp. 1075-1082.

nate the association as the employer, and thereby circumvent the intent of Congress.”<sup>48</sup>

From the evidence it appears that the House thought it was somewhat limiting the Board when it abolished the “or other unit” phrase, and it did not comprehend the definitions possibility. Apparently the Senate realized that the definitions provided for the multiple-employer unit and hence “compromised” thereby nothing at all.

In attempting to limit the unit, Mr. Ramspeck had brought into focus one of the long-time labor problems of the nation and a source of fierce opposition to the Act. Mr. Ramspeck’s objective was to protect the southern textile employers, who feared that a whole industry might be regarded as a unit. The stronger unionization of the North might mean northern representatives would carry on the bargaining and fix southern wages and hours, and this the southern employers feared.<sup>49</sup>

The error of the House in failing to see the possibilities via the definitions is heightened by the history of all of Section 9(b), which is the Board’s basis for statutory construction. When Section 9(b) left the Senate, it read:

“The Board shall decide in each case whether, in order to effectuate the policies of this act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit.”<sup>50</sup>

The House committee reworded this section by adding to it so that it read:

<sup>48</sup> Smith Hearings, Vol. II, No. 15, p. 604.

<sup>49</sup> MR. RAMSPECK: “The whole purpose of my amendment, frankly, was aimed at this textile situation. The amendment was suggested to me by some men from North Carolina who said they wanted to vote for the bill, but they were afraid of it with that language in it, because at that time there was practically no organization in the South in the textile industry. There was organization in the North. And they were afraid that the two sections of the country would be combined into one unit.

“If the Board follows the policy laid down in the *Pacific Longshoremen’s* case, there is no question in my mind that they could combine the entire textile industry. . . .”

H. Hearings on N.L.R.A., Vol. III, p. 1075.

<sup>50</sup> Congressional Record, 74th Congress, 1st Session, p. 9727, and pp. 10298-10299.

"The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or other unit."<sup>51</sup>

The change made by the House remained and is in the Act. In lay language, Section 9(b), after the change, said that the Board shall decide the unit in such manner as will enable the employees to enjoy the full benefits of self-organization and of collective bargaining. The Board was to appraise and analyze each case on its merits in order to maximize those benefits, and the Board was to decide.

It thus appears that the House increased the latitude of Section 9(b), as was borne out by the attitude of some Board members<sup>52</sup> who argued that they must determine the unit so as to maximize benefits, while the so-called "compromise" was neither compromise nor limitation.

The Board is seriously criticized for its statutory construction of the unit provision. But industry-wide bargaining is not uncommon in the United States, and in Britain and Sweden "collective bargaining" means industry-wide bargaining. Even here many industries engage extensively in bargaining through multiple-employer units, including coal mining, transportation, clothing, glass, and the maritime industries. To limit the scope of the Board here might render less likely the development of successful collective bargaining.

#### E. Unit Determination Under Other Legislation

The AF of L has urged that Congress intended the Wagner Act to be patterned after the Railway Labor Act.<sup>53</sup> To that end the amendment offered by the AF of L followed the New York Act, the enforcement of which basks in a favorable light. Attention may, therefore, be turned to ascertain whether the railroad legislation or the New York legislation would solve the unit problem.

<sup>51</sup> *Ibid.*, Italics supplied. The change was made, according to the Conference report, in order ". . . to express more explicitly the standards by which the Board is to be guided in deciding what is an appropriate bargaining unit."

<sup>52</sup> *Infra*, Chapter X.

<sup>53</sup> S. Hearings on N.L.R.A., Part 5, p. 842.

### 1. *The New York Act*<sup>54</sup>

The New York Act seemingly settled the unit problem by providing that the unit shall be the "employer unit, craft unit, plant unit, or any other unit," and "where the majority of the employees of a particular craft shall so decide the Board shall designate such craft as a unit appropriate for the purpose of collective bargaining." While the law apparently is ironclad from the viewpoint of the AF of L, in practice the administration of the Act has been similar to that of the Wagner Act. The desires of employees are not followed blindly, as was indicated by the New York Board when it said:

"While it is the desire of the Board to allow employees full freedom to express their choice in a bargaining unit, such choice alone is not determinative of the issue of the appropriateness of the bargaining unit where other circumstances of equal or greater weight are furnished . . . ."

" . . . In cases where the considerations affecting the choice of the bargaining unit have been more or less evenly balanced, it has given particular groups of employees an opportunity in election by secret ballot to indicate whether or not they desired to be included in a separate bargaining unit."

It appears that the New York Board actually applied what the National Board termed the *Globe* doctrine. There seems little difference between the two Boards in the practical settlement of the unit problem and no difference at all in principle.<sup>55</sup> Both Boards hold that the legislative body provided that the unit determination was to be made by the administrative board, and both Boards believe that such power is exclusive to them and may not

<sup>54</sup> For material and quotations see *Annual Report of the Industrial Commissioner*, State of New York, N. Y. State Dept. of Labor, Legislative Document (1939) No. 21, pp. 185 ff.

<sup>55</sup> But in an election to determine the representative, the New York Board's ballot affords an opportunity to vote directly on the unit. The voter votes "yes" or "no" to the question, "Do you desire that the x workers shall bargain collectively as a separate unit?" The National Board gives a choice between contesting unions, one of which desires the smaller unit included within the larger unit and one of which desires it to be a separate unit. The assumption is that the choice of the union determines the choice of the majority as to the form of unit and thus settles the representatives and unit questions at once.

be exercised by any other public agency or private parties. Both Boards agree that even a unit determined by agreement has no legal validity under the Act until the Board makes a finding of fact and thereby validates the agreement; yet each Board is extremely hesitant to wipe out units arrived at by stipulation of the parties, and both endeavor to apply the law so as best to effectuate collective bargaining.

## 2. *The Railway Labor Legislation*

The Railway Labor Act, as amended in 1934, provides that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."<sup>56</sup> It is this provision upon which the AF of L relied when it argued that the Wagner Act was meant to match the railway legislation.

It is erroneous to believe that on the railroads, where the union militancy stage has been passed and the procedure of collective bargaining is crystallized, no unit problems arise. The problem is met with to such an extent that the National Mediation Board in its first four annual reports bitterly criticized the national labor organizations for the undue time and energy interunion disputes demanded of the Board.<sup>57</sup> Mr. William Leiserson, a former chairman of the National Mediation Board, has said:

"The wording in the Railway Labor Act does not eliminate jurisdictional disputes between unions, whether they be affiliated with the AF of L or the CIO or unaffiliated with either . . ."

"The mere fact then that the term craft or class of employees is used in place of appropriate bargaining unit does not settle these distressing conflicts. However the law is worded, controversies are bound to arise . . ."

"I do not think the Government can eliminate these disputes by any wording that Congress may use in the laws. Both the Labor Relations Act and the Railway Labor Act have shown, however, that much can be done under these acts to settle the disputes peacefully either by elections or mediation, and it is desirable that these efforts should con-

<sup>56</sup> Public No. 442, Section 2.

<sup>57</sup> See the Annual Reports of the National Mediation Board, 1935 to 1940, inclusive. During 1939 and 1940 the situation apparently improved for the Board.

tinue, for the controversies affect vitally not only the employees and their organizations but the employer and the public generally as well."<sup>58</sup>

Thus, the Mediation Board found it as difficult to define what constitutes a "craft" or "class," and who should be in it, as the National Labor Relations Board found it to define an appropriate unit; and the AF of L amendment would not solve the problem.

<sup>58</sup> S. Hearings on N.L.R.A., Part 6, pp. 993-994.

## Chapter X. BOARD MEMBERS' VIEWS ON THE UNIT

The debate over the appropriate unit was heightened by the disagreement of the Board members themselves in the interpretation of the unit provision. The record establishes an absence of bias and prejudice on the part of the Board members, and the disagreement arose only out of honest differences of opinion. Nevertheless it was the underlying philosophy of some of the Board members that gave rise to the AF of L and other pressure demand that the Board members be replaced. The interpretation and record of each Board member may be reviewed.

### A. Mr. Donald Wakefield Smith

The AF of L charged that Mr. Smith was not acquainted with the methods of American labor.<sup>1</sup> The basis for this charge was the *Finch* case,<sup>2</sup> which Mr. Smith referred to as an unusual one; and the Federation used this reference to show that Mr. Smith did not understand the methods of trade unions and that he was biased for the CIO.

The *Serrick* case<sup>3</sup> was the basis of the Federation's charge that Mr. Edwin Smith had converted Mr. Donald Smith to a philoso-

<sup>1</sup> Mr. Smith was not reappointed in 1939, apparently because of the AF of L resistance. The executive council of the Federation in Aug., 1938, requested President Roosevelt not to reappoint Mr. Smith.\* In his place was appointed Dr. William Leiserson. The AF of L received the appointment of Dr. Leiserson with equanimity, but by January, 1940, Mr. Green was testifying before the Smith Committee that ". . . I have disqualified all of them long ago as fair and impartial. They are out the window so far as I am concerned. . ." Smith Hearings, Vol. II, No. 9, p. 287.

<sup>2</sup> *Supra*, Chapter IX, C(a).

<sup>3</sup> 8 N.L.R.B. 621. The Board's order was eventually sustained by the Supreme Court on Nov. 12, 1940, in *International Ass'n of Machinists v. N.L.R.B.* N.L.R.B. Press Release, J-395.

phy of industrial unionism, and therefore the Federation opposed the latter.<sup>4</sup> In that case the CIO had begun to organize when the International Association of Machinists, an AF of L craft affiliate, began to organize the toolroom employees. The Board found that the employer assisted the I.A.M. The I.A.M. then started a local for the production employees. The CIO requested a unit combining the production and toolroom employees, and the AF of L demanded that the toolroom constitute a separate unit. Because the employer had been guilty of aiding the I.A.M. and because the toolroom employees had never freely expressed a desire for a separate unit, the Board unanimously held a single unit to be appropriate. The decision pointed out that the division of the employees into two I.A.M. locals was artificial and that the I.A.M. could not properly seek a separate unit because it was in fact competing with the CIO in organizing the production employees by the subterfuge of two locals, a portion of the decision from which Chairman Madden dissented on the grounds that it was unnecessary to the decision. Hence, from this case stemmed the AF of L's charge that "Board member Donald Wakefield Smith has been won over by Board member Edwin S. Smith to the foregoing destructive process of reasoning."<sup>5</sup> The charge was made that the Smiths constituted a majority on the Board in the application of the *Globe* doctrine despite E. S. Smith's vigorous dissents from some applications of the doctrine.

Donald Smith's record shows that he adhered to the *Globe* doctrine of craft self-determination and thereby with Mr. Madden constituted a majority. Mr. Smith dissented in no case against the application of the *Globe* doctrine or against finding that a craft unit was appropriate. While Mr. Smith was a Board member, whenever a craft-unit claim was rejected there was unanimity on the Board, though in two cases he wrote concurring opinions in applying the *Globe* doctrine. Mr. Smith also wrote one concurring opinion in a case involving the inclusion of certain employees in the unit and in one case wrote a concurring opinion where he and Mr. Madden found that an employer had not violated the Act. Throughout his service on the Board, Donald Smith dissented from his colleagues on two occasions: In one case he

<sup>4</sup> S. Hearings on N.L.R.A., Part 5, p. 857.

<sup>5</sup> S. Hearings on N.L.R.A., Part 5, p. 884.

held that there was sufficient evidence to warrant a hearing to determine whether there had been interference by an employer in an election; in the other case he held that an unfair practice charge should have been dismissed because of insufficient evidence.<sup>6</sup>

Mr. Smith viewed the AF of L criticism as a challenge not to formulate decisions in order to avoid offense to interested groups. He believed that the choice of the employee was of major importance. He urged that the Act gave labor organizations no rights and that their position under the Act was dependent upon the employees. Mr. Smith opposed the AF of L unit amendments because he feared rigidity, and he argued that neither rival organizations nor the employer could determine the unit.

### B. Mr. Edwin S. Smith

The views of Mr. Edwin Smith were at variance with those of other Board members and constituted the basis of much AF of L opposition.<sup>7</sup> Mr. Smith sometimes dissented in the application of the *Globe* doctrine; and the AF of L feared that, should his views come to be the views of the majority, AF of L unions would be in a difficult position.

Mr. Smith concurred in the *Globe* case. He also concurred in applying the *Globe* doctrine in another decision the same day and one following shortly thereafter. But when the *Allis-Chalmers*<sup>8</sup> case was decided, Mr. Smith dissented because he feared the wisdom of applying the doctrine universally. His position and interpretation of the act were as follows:

1. The Board was abandoning its necessary judicial function of making a reasonable determination of the appropriate bargaining unit in accordance with the facts of a particular case.

2. By letting the craft vote, the wishes of the majority are ignored. Full self-determination for the minorities is provided at the expense of the majority. Mere voting does not throw light on the best unit to effectuate the policies of the Act.

<sup>6</sup> S. Hearings on N.L.R.A., Part 7, pp. 1211 ff.

<sup>7</sup> See S. Hearings on N.L.R.A., Part 9, pp. 1565 ff., Part 5, p. 832; Smith Hearings, Vol. II, No. 15, pp. 594-609, 646-648; Vol. II, No. 16, p. 667.

<sup>8</sup> 4 N.L.R.B. 159.

3. The Act states that the Board shall decide the appropriate unit in each case in order to establish that form of collective bargaining most likely to lead to industrial peace and stability. The unit must be established on the facts presented.

4. To permit the crafts to set themselves off weakens the collective action of others. All would be strengthened if all were joined together.

It is not to be concluded that Mr. Smith never favored craft unions; for whenever there was a history of collective bargaining he held for the craft groups involved. While Mr. Smith's idea as to a "history" of bargaining was not too severe, he insisted that there must be craft adherence and cohesion over time.

Mr. Smith not only possessed a strong belief, which began prior to the AF of L-CIO conflict, that there is a powerful evolving tendency toward industrial unionism in the United States, but also he favored wide bargaining and industrial units because he believed that thereby bargaining power would be more nearly equated and better industrial relations would result. He strongly adhered to the belief that several bargaining units made for less strength and more strife than fewer units; hence his decisions veered toward the industrial unit, the multiple-plant units, and the multiple-employer units in the absence of any distinct reason for a smaller unit. Mr. Smith's dissents were not, however, based upon his philosophy of the fluid labor movement but on the facts presented and what appeared in light of the facts to be the unit which would best effectuate the policies of the Act. He was scrupulous to favor an industrial unit only if a substantial proportion of the employees so desired.

Mr. Smith opposed the AF of L amendments which would make it mandatory on the Board to find a unit whenever any group so desired. To Mr. Smith, who insisted that every case has its own characteristics, any legislative definition would be an error; and he thought the difficulties of the Board's defining a craft would be the same problem. For evidence to sustain his position, he pointed to the AF of L's jurisdictional problems. Mr. Smith argued that the best solution was to leave the unit determination to an administrative agency because that is exactly the kind of problem such an agency is equipped to solve. He followed an interpretation that would leave the Board free to decide each case

so as best to promote collective bargaining. Because an industrial unit or a craft unit had previously been the unit used would not prevent Mr. Smith from finding another unit. This idea represented a division among the Board members as to congressional intent and philosophy. Mr. Smith was a strong exponent of flexibility:

"I do not agree with the foregoing opinion, however, that the Board 'is not authorized by the Act' to find a different bargaining unit from that which has previously been embodied in an exclusive bargaining contract. I think the past history of collective bargaining in a plant, particularly as evidenced by an exclusive bargaining contract, is an important and persuasive factor in the determination of the appropriate bargaining unit. But I do not believe that the Board is precluded by anything in the Act from finding a different unit to be appropriate; nor do I believe that, where all the circumstances warrant it, the Board should refrain from exercising the power to find a different unit."<sup>9</sup>

Mr. Smith is here expressing the belief that Congress intended that the facts, circumstances, and the multiplicity of factors found in each case should be weighed by the Board, as an administrative agency, and that the Board alone should determine the unit. The sole exception was where all parties agreed on the unit.

Neither Mr. Smith's own philosophy as to the evolution of the labor movement nor his belief that the AF of L amendments should not be enacted led him to favor the CIO in his decisions. His reputation as a dissenter was based more on the vitality of the dissents than the number. From the effective date of the Act to January 1, 1940, Mr. Smith had 59 dissents in 1499 Board decisions. In unfair labor practice cases he dissented in 11 of 618 decisions, and he dissented in 48 of 652 representation cases. Of the 652 representation cases, 114 involved the AF of L-CIO conflict. In 24 cases Mr. Smith disagreed with the majority of the Board on the application of the *Globe* doctrine, in one of which he favored the AF of L contention. He concurred in the application of the *Globe* doctrine in 12 decisions in which he wrote a separate opinion; in 13 cases he concurred in the unanimous application of the *Globe* doctrine without writing a separate opinion. He, therefore, did concur in the *Globe* doctrine in 25 cases, even

<sup>9</sup> *Matter of the American Can Co.*, 18 N.L.R.B. 126.

though he felt that it was fundamentally unsound. In his concurring opinions Mr. Smith agreed with the AF of L in all but one case, where he agreed with the CIO contention. He, therefore, really supported the AF of L position in 25 cases, due to the nature of the *Globe* doctrine, and supported the CIO position in 24 cases.

Nor were Mr. Smith's dissents confined to the CIO-AF of L controversy. He dissented in 4 cases where the conflict was between the AF of L and an unaffiliated union, and in 2 cases where the CIO was involved with an unaffiliated union. Four of the dissents favored established craft unions. He concurred in applying the *Globe* doctrine in 1 case between the AF of L and an unaffiliated union, in 5 cases between the CIO and an unaffiliated union, and in 1 case between two unaffiliated unions.

### C. Mr. Warren Madden

As long as Donald Smith was a member of the Board, the views of Mr. Madden prevailed, for both believed in the application of the *Globe* doctrine. It was only after Mr. Leiserson replaced Mr. Smith that the *Globe* doctrine was modified.

Mr. Madden thoroughly believed that the Board had received a mandate to determine the unit, but he believed that the employees should express themselves by "local option" when it was not clear what the unit should be. Mr. Madden opposed the AF of L amendments because he believed that an administrative agency was better equipped to designate the unit with better results than could be attained by any rigid formula which Congress might devise. He recognized that the proposed AF of L amendment would permit any group, without any background or history of bargaining or craft characteristics, to set itself up as a separate unit; and he opposed any such attempt.

Mr. Madden's views and approach are crystallized in excerpts from two of his dissenting opinions. In the *Milton Bradley Co.* case he said:<sup>10</sup>

"I further do not agree . . . that the Board is not authorized to find a unit different from that which the parties . . . have considered to be appropriate and which they have embodied in a contract. I be-

<sup>10</sup> 15 N.L.R.B. No. 105. In reading the excerpts, reference should be made to the views of Mr. Leiserson, *infra*, D.

lieve that the past history of collective bargaining in a plant, as evidenced by collective bargaining agreements, is a factor entitled to great weight. . . . But I do not believe that a prior exclusive existing contract is, by itself, decisive of the issue. . . . The form which a collective agreement takes normally depends upon a variety of fortuitous circumstances, differing from plant to plant. It cannot be said . . . to represent invariably the most effective unit for collective bargaining or the unit that is fairest to the conflicting interests involved. Other important factors cannot be ignored. These include, for instance, the history of collective bargaining throughout the industry as a whole as well as the structure of various labor organizations which admit to membership the employees, or some of the employees, in question.

"Furthermore, while an exclusive bargaining contract may represent the agreement of employers and employees at the time it is executed, clearly it does not necessarily represent that such agreement will continue forever. If we are to be guided solely by the terms of previous contracts . . . it is in practical effect impossible, after a contract has once been made with an industrial union, for craft groups of employees ever to obtain craft units except by first destroying the industrial union. Thus unions which may have organized on the basis of craft units in other plants for many years are effectively excluded forever from the plant. And, indeed, a craft union may have bargained for many years for a craft unit, but if at one election or in one contract the workmen in the unit amalgamate themselves with a larger industrial unit, it becomes perpetually impossible for them ever to resume their former form of organization.

"Again, a . . . contract may not necessarily represent the agreement of employer and employees even at the time it is executed. It may be and often is an expedient, a compromise, a gentlemen's agreement between two contesting groups . . . in order to present a united front to the employer, while really giving separate representation to the two groups. These arrangements, often used to settle troublesome industrial controversies, are made unsafe. . . . I doubt whether unions will resort to these desirable settlements, regarded by them as experimental and tentative, if the Board treats them as final and perpetual determinations of the form of the bargaining unit.

". . . The Board has consistently held that it would not find appropriate a subordinate part or fragment of the group which has conventionally bargained on a craft basis. It is true that the application of the *Globe* doctrine may result in a portion of an industrial unit being separated from the main group. But this result follows only when a majority of a group that has conventionally bargained as a craft are

in favor of the separation and the alternative is to deny a craft union of many years' standing . . . the right to organize in the particular plant at all.

" . . . I see nothing whatever in the [Act] which indicates an intention of Congress that the Board, in determining the appropriate unit, is governed solely by the terms of a previous exclusive collective bargaining contract. It would have been comparatively easy for Congress to have expressly included in Section 9(b) a provision to the effect that the Board should be bound by previous agreements even though these agreements had expired. Congress did not do this, however, but left the matter to the discretion of the Board. Nor is there anything in the legislative history of the Act which indicates an intention by Congress that the Board be bound by the terms of previous collective agreements. On the contrary . . . "

On the application of the *Globe* doctrine, Mr. Madden held:

" . . . I think that the Board should, even in the absence of substantial past bargaining history in the particular plant in question, properly allow the desires of the employees in a *recognized craft* to be determinative as to whether they will be included or excluded from an industrial bargaining unit." <sup>11</sup>

Since the *Globe* doctrine is for the maintenance of the *status quo* and for benefit to the craft unions, opposition to Mr. Madden on this basis is difficult to understand, although Mr. Madden's insistence that the Board should determine the unit undoubtedly brought criticism.

Mr. Donald Smith and Mr. Madden applied the *Globe* doctrine as a majority, and since the rejection of craft claims was by a unanimous Board one would expect no dissents by Mr. Madden in representation cases. He did, in fact, prior to June 1, 1939, dissent in part in the *Finch* case; <sup>12</sup> but there the issue involved one person constituting a unit. In the *Serrick* case <sup>13</sup> he opposed part of the decision as unnecessary. In the *Todd-Johnson* case <sup>14</sup> he concurred in the opinion in order to permit a certification to be made,

<sup>11</sup> In the Matter of Joseph F. Finch Co., Inc., 10 N.L.R.B. 896. Italics supplied. "Craftness" was the basic element to Mr. Madden.

<sup>12</sup> *Ibid.*

<sup>13</sup> 8 N.L.R.B. 621.

<sup>14</sup> 10 N.L.R.B. No. 48.

although he thought the original order and investigation improvident. After June 1, 1939, however, Mr. Madden did dissent. The interpretation of the Act by Mr. Leiserson left Mr. Madden a minority member of the Board.

#### D. Mr. William Leiserson

Mr. Leiserson came to the National Labor Relations Board from the National Mediation Board and with a background of mediating labor disputes on the railroads. He endeavored to carry over to the National Labor Relations Board the interpretations he had found most successful in administering the Railway Labor Act, and this affected his interpretation of the Wagner Act. But perhaps Mr. Leiserson's work on the National Mediation Board did not always permit employees *full* self-organization and the benefits therefrom.

Mr. Leiserson:

" . . . We have the same right to determine the bargaining unit for the railroad industry that the Labor Relations Board has for the other industries, except that in the Railway Act the unit is defined as craft or class. When we first started we tried to find out what a craft or class was, and we did not know and nobody else knew. Some said that a craft was a combination of crafts, and some said that a craft meant a combination of classes. We find an organization like the Brotherhood of Railway Clerks, that takes in office workers, stenographers, janitors, stockyard laborers, freight handlers, dock foremen, just everything, but they call it one craft; they say 'Our craft' or 'class,' and they name it 'clerical, office, station, and storehouse employees.'

"Now, of course, there are groups of employees in various occupations that want to separate out from time to time, or, as we recently had, the Hotel and Restaurant Employees Union, the dining employees, cooks, waiters, pantrymen, dishwashers, and a railroad organization came along and it wanted to vote the cooks as a craft. Well, they defined it that the cooks are a craft; they work in the kitchen, the waiters are something different; they work in the dining car. We had to determine that issue. We determined it by holding that the agreements in effect had always been cooks, waiters, pantrymen, dishwashers, all together, and that we could not approve the splitting away of a part of a class or craft. We held that these cooks were only

a part of a craft or class. Well, the organization that wanted that raised the devil with us, but we told them that is the way we read the law."<sup>15</sup>

Even on the railroads, where the unions are crystallized, there are still exhibitions of groups desiring to have separate representation. Apparently the National Mediation Board had sometimes prevented a change where there had been a history of bargaining in a given situation. This was the approach of Mr. Leiserson when he came to the National Labor Relations Board: If the parties had any self-organization and their own voluntary arrangements before a contesting union appeared, then the parties are foreclosed from changing their status. If there had been an industrial unit and an exclusive contract, a craft could separate out only if the larger unit released it. In effect this would mean no separation, for rarely would an industrial unit weaken its own structure in such a fashion.

Mr. Leiserson thought the Board should not pass judgment on the type of unit, and he did not believe that Congress intended so to empower the Board. The established customs and practices of employees would reveal to the Board the most effective units, and Mr. Leiserson believed the AF of L and CIO would accept such an interpretation. This represents an interesting difference with other Board members: Mr. Leiserson believed the Board should determine the unit—indeed, *must* do so—but only on the basis of past bargaining relationships; Madden and Smith strongly believed that the Act demanded that the Board consider not only the past but also the present in order best to effectuate the policies of the Act and to *maximize* benefits. Mr. Leiserson apparently felt that benefits could be maximized by focusing on the history; the majority of the Board felt that the past should not straitjacket the future and that the Board should not hesitate to find a unit which would best serve the employees here and now.

It was apparently this emphasis on organizations and past experience that led Mr. Leiserson to say that the Board had no authority to make an interpretation such as it made in the *Longshoremen's* case.<sup>16</sup> To Mr. Leiserson the question was: Could a

<sup>15</sup> S. Hearings on N.L.R.A., Part 6, pp. 1002-1003.

<sup>16</sup> See his testimony in Smith Hearings, Vol. I, No. 1, p. 20.

larger union swallow a minority union? To the unanimous Board the question had been, What unit will best effectuate the policies of the Act and maximize the benefits for the employees? Mr. Leiserson's opinion in the *Pittsburgh Plate Glass* case<sup>17</sup> indicated that he did not believe in multiple-plant units without each plant's separately voting on the unit, and his remarks on the *Longshoremen's* case indicate that he believes generally in atomic units.

Because of the prestige and experience of Mr. Leiserson, his ideas on the unit and the function of the Board are to be noted:<sup>18</sup>

"By assuming authority to alter bargaining units established and maintained by collective agreements the Board endangers all union contracts whether these are negotiated on a craft basis, a plant basis, industry basis, or on the basis of any other unit that the parties have found appropriate in bargaining collectively. Because craft unions rarely consist of one craft only but commonly are a combination of several skilled occupations together with helpers and other semi-skilled and unskilled workers, the assumption of authority by the Board in substituting its judgment as to the appropriateness of a unit for the customs and practices of collective bargaining as evidenced by contracts threatens with disruption craft unions as well as the unions that are organized on a so-called industrial or other basis."

". . . If the bargaining units maintained by . . . organizations in their contracts may be changed or split by the Board when it feels that other units are preferable, then the existence of these unions as well as their established contractual relationships with employers are at the mercy of the members of the Board. Every disgruntled occupational group within a craft or other unit might well demand and secure separate certification if the Board is not bound by the bargaining units established by contracts.

". . . If the authority is lodged in the Board, as is contended, then the fact that it may not yet have been exercised makes it no less dangerous to labor organizations and their contracts with employers. I am of the opinion that Congress intended the Board to be bound by the bargaining units established and maintained by collective agreements."<sup>19</sup>

<sup>17</sup> 15 N.L.R.B. No. 58.

<sup>18</sup> Compare these excerpts with those from Mr. Madden, *supra*.

<sup>19</sup> *Matter of Milton Bradley Co.*, 15 N.L.R.B. No. 105.

The next portion of Mr. Leiserson's opinion is devoted to comparing the Railway Labor Act with the Wagner Act. Mr. Leiserson points out that the Circuit Court of Appeals for the District of Columbia had reviewed the National Mediation Board's findings as to craft or class and stated:

" . . . We think . . . that it was intended by Congress to adopt the designation of class or craft as determined by the then current working agreement between the railroad and particular groups or classes of its employees . . . "

" . . . We think it is obvious that how classes are to be formed and who shall compose them are matters left to the employees themselves; and so we think that by reference to the terms of the working agreement which the employees have made, is to be found at least some evidence of who are members of the craft or class covered by that agreement . . . "<sup>20</sup>

Mr. Leiserson therefore argued that the current working agreement determined the unit, that the rule was working satisfactorily under the railway legislation, and that it was required under the Wagner Act if the purposes were to be accomplished.<sup>21</sup>

Despite his severity of language in some cases<sup>22</sup> Mr. Leiserson has testified that differences in Board interpretation of the Act were a matter of honest differences of opinion.<sup>23</sup> Mr. Leiserson felt that the duties of the Board are chiefly administrative and but slightly quasi-judicial. Intra-Board differences have probably

<sup>20</sup> *Ibid.*

<sup>21</sup> Mr. Madden's dissent pointed out:

1. The Railway Act is applicable to an industry where collective agreements are established and stable and more reliance can be placed on what has been worked out. In industry as a whole there is no uniformity of conditions nor substantial history of bargaining.

2. Since the Mediation Board insists upon units in accord with conventional methods of organization, the Wagner Board too should be permitted, despite history, to establish old and conventional units (crafts) where demanded.

3. The Circuit Court of Appeals decision referred to by Mr. Leiserson is not clear, since the decision says (a) that the agreements existing should determine the unit and (b) that by reference to the existing agreements will be found evidence as to who are members of the class or craft. And in any case the remarks on the unit constituted dictum since the holding in the case was that the National Mediation Board had refused to grant the parties to the dispute a "real hearing" and the court remanded the case to the Board for such hearing.

*Ibid.*

<sup>22</sup> See, for example, *Matter of Globe Newspaper Co.*, 15 N.L.R.B. No. 106.

<sup>23</sup> Smith Hearings, Vol. I, No. 1, p. 20.

been overemphasized in the public mind. For example, from June 1 to October 15, 1939, Mr. Leiserson participated in 117 cases. In 8 cases he dissented in full, and in 4 he dissented in part. Of the 117, 79 were representation cases, in which he wrote a full dissent in 7 and a partial dissent in 4. In complaint cases there was a full dissent in but 1 case in that period.<sup>24</sup>

In sum, the position of the Board members was as follows:

Donald Smith and Chairman Madden were strong exponents of the *Globe* doctrine and would apply it whenever there was doubt as to the proper unit and if there was any "craftness." Edwin Smith dissented from the *Globe* doctrine application in the absence of a pronounced craft disposition, which to him was best demonstrated by a history of successful bargaining. He thoroughly opposed the carving of craft units out of industrial units. William Leiserson would apply the *Globe* doctrine only in new situations and even there would hesitate if the employees had any forms of voluntary organization. Mr. Leiserson, indeed, would not recognize such a doctrine as the *Globe*, for his interpretation of the authority vested in the Board did not extend that far.

All Board members except Mr. Leiserson believed that the Board had a mandate under the act to determine the unit so as to maximize benefits. This belief extended to a consideration of each case on its merits and in light of all circumstances, and past history was only one factor.

One might describe Mr. Leiserson's view as that of a person highly trained in mediation work, who was hesitant to change the *status quo*. The view of the other Board members reflected their belief in the administrative method as a means to effectuate best the policies of the Act, so that after Mr. Leiserson came to the Board the real difference in viewpoints appears to have been rigidity v. flexibility.

Mr. Leiserson's appointment to the Board changed the application of the *Globe* doctrine. Mr. Leiserson and Mr. Edwin Smith, for different reasons, constituted a majority so that the doctrine could no longer be applied. Mr. Leiserson opposed any departure from any arrangement made in the past, no matter whether groups were disgruntled; Mr. Smith opposed craft unions' carving themselves out from industrial units. Either of these views would

<sup>24</sup> Smith Hearings, Vol. I, No. 1, p. 72.

mean no craft unit could ever get a foothold where the exponent of the larger unit had priority. Mr. Madden clung to the "local option" of the *Globe* decision.

How did "craft unionism" fare under the *Globe* doctrine? From the effective date of the Act until January 1, 1940, the AF of L requested a craft unit in 176 cases.<sup>25</sup> The claim for the craft unit, counting *Globe* elections, was granted in 138 of the cases, there was no decision in 2, and the claim was denied in 36 cases, in 8 of which the AF of L claims were denied as to some craft groups and granted in others. The 36 denials were for the following reasons:

In 12 cases the claims were denied because the craft had substantially no members among the craft employees, and the craft employees had indicated no desire for a separate unit.

In 12 cases the claims were denied because the employees who claimed to constitute a craft had never been considered a separate craft group.

In 1 case the craft could not define limits so that the Board could know who was included.

In 1 case the craft had expressed approval of a one-year contract which was made with an industrial unit and which had eight months to run.

In 1 case there were but two employees in the craft, and one of them belonged to the industrial union.

In 1 case eight craft unions sought a multiple-craft unit. (But the Board did not decide that each craft by itself could not constitute an appropriate bargaining unit.)

In 1 case there was only one employee in the unit sought by the craft.

In 1 case the AF of L set up two locals to organize the plant, one for the craft workers and one for production workers; but the refusal was based on unfair practices by the employer.

In 5 cases the claim for the craft was denied by a divided majority: Edwin Smith held that there was insufficient bargaining history; Mr. Leiserson held that an industrial union previously had an exclusive collective-bargaining contract; Chairman Madden dissented in favor of the *Globe* doctrine.

In one other case the claim for a craft was again denied by a divided majority: Edwin Smith held that a prior decision of the Board had

<sup>25</sup> Smith Hearings, Vol. II, No. 14, p. 551.

certified an industrial union as the exclusive bargaining representative for all; Mr. Leiserson argued that the Board should not depart from a prior certification; Mr. Madden dissented again in favor of the *Globe* doctrine.

It appears that until Mr. Leiserson came to the Board no claim for a craft unit was denied where there was any history of bargaining, a majority of the craft workers desired separate representation, and there was no bar because of an existing contract.

## Chapter XI. THE LABOR MOVEMENT AND THE UNIT

The publicity given the unit problem has left with the public the impression that the problem of craft units v. industrial units is synonymous with the conflict between the AF of L and the CIO. Yet, from the inception of the Board until January 1, 1940, the AF of L requested that the Board find an industrial unit appropriate in 345 cases as compared with its request for a craft unit in 176 cases. The AF of L also asked in 6 cases out of the 345 that skilled groups who wanted to separate be included in the larger unit requested by them.<sup>1</sup> Likewise, the CIO on occasion requested the Board to find a smaller unit than the AF of L was requesting in the same case.

### A. The AF of L

In attempting to appraise and weigh the validity of the AF of L and CIO positions, one must consider the realities of the organized labor movement. The belief that the AF of L is now a "craft" movement and that the CIO stands for industrial unionism is largely erroneous. Throughout its history, the jurisdictional disputes of the AF of L have been to determine which union may organize a group of workers, and no test is inevitably applied to ascertain whether the workers are "craft" workers. All types of unionism have always been found in the Federation, and this is especially true since the split in the labor movement. Indeed, the issue to the Federation itself is not one of defining crafts. Mr. Frey, of the Federation, testified:

" . . . The term 'craft' is unfortunate in these days. It conveys an entirely erroneous impression. There have never been pure crafts

<sup>1</sup> Smith Hearings, Vol. II, No. 14, p. 551; No. 15, p. 647.

except in one or two instances, since the breaking down of the Guild system. . . .

"The unions that comprise the Metal Trades Department are not craft unions, although they are called such. The electrical workers is not a craft union. Its members work on the railway signal lines. Its members string electric and telephone lines. Its members put up the high-duty lines. Its members work in the manufacturing industries in connection with electrical equipment. Its members are the service men for electrical equipment.

"The same is true for machinists and a number of others. The only craft unions we have in the Metal Trades Department are the pattern makers and the draftsmen . . ."<sup>2</sup>

Mr. Padway, of the AF of L, testified:

". . . There is no such thing as real industrial unionism. We call it that but it is a misnomer. . . .

"If there were real industrial unionism, instead of the CIO having some 35 internationals and the AF of L 102, there would be close to 2000.

"If you were to formulate unions on the basis of industrialism, you would have close to 2000. . . . And then where would you draw the line in industry? . . ."

The American Federation of Labor has limited industrial set-ups. The CIO has limited industrial set-ups . . ."<sup>3</sup>

Before the Senate Committee, Mr. Padway testified:

SENATOR ELLENDER: "Judge Padway, . . . could you define a craft for us? What do you mean by it?"

JUDGE PADWAY: "I would not undertake to define a craft by a general definition . . .

"The reason I would not want to define a craft is that it changes from time to time; technological improvements bring about changes. To give you a hard and fast definition of craft, I don't believe I could do it, and I don't think any well-informed labor man would undertake to do it."<sup>4</sup>

<sup>2</sup> H. Hearings on N.L.R.A., Vol. III, p. 687.

<sup>3</sup> H. Hearings on N.L.R.A., Vol. III, p. 828.

<sup>4</sup> S. Hearings on N.L.R.A., Part 5, p. 860.

The structure of the AF of L demonstrates that a "craft" is rapidly becoming an historical curiosity. The Federation began by the joining together of what might be called strictly craft unions,—unions whose members had to have identical skill and training and who could carry through to completion a particular whole process. But as the Federation grew and flourished and as technology changed industry, crafts died and blossomed and amalgamated and took jurisdiction until the relative position of the craft is weak so far as total membership is concerned.<sup>5</sup>

#### THE AF OF L STRUCTURE BY UNION TYPE AND MEMBERSHIP, 1938

Type	Number of unions	Membership	Percentage of AF of L membership
Craft	12	25,800	1.00
Multiple Craft	19	458,300	15.00
Trade Unions	13	814,800	27.00
Semi-Industrial	27	611,000	20.00
Industrial	10	815,600	27.00
Miscellaneous	4	304,600	10.00
	<u>85</u>	<u>3,030,100</u>	<u>100.00</u>

The above data are virtually verified by the AF of L itself. Mr. Green, in response to inquiries by the Senate Committee, furnished a statement which listed one million members of the AF of L organized in strictly industrial unions and three million members organized into "trade unions, craft unions, and semi-industrial unions."<sup>6</sup>

The idea that the Federation represents men who have plied their skill through long years is an idea that finds popular favor. Even in early 1940, Mr. Green was pleading the cause of craft unionism. But the real issue between the AF of L and the CIO was the same issue that has plagued the Federation since its inception: Not who should be organized; not how to organize; not primarily the craft union v. the industrial union; rather, which organization gets "X" group of workers—the old jurisdictional issue embellished with the problem of modern mass production.

The AF of L-CIO conflict was not originally an issue of personalities. The real problem was one of bringing the newly organized workers into the Federation through the existing organization and

<sup>5</sup> The data are from an analysis made by David Saposs and Sol Davisson, *Labor Relations Reporter*, Bureau of National Affairs, Vol. IV, No. 11, pp. 6-9.

<sup>6</sup> S. Hearings on N.L.R.A., Part 4, p. 663.

leadership, and it does not appear to have been primarily whether the unorganized should be organized. It follows, however, that a leadership faction might prefer that the unorganized remain so rather than risk loss of position to the unions and their leaders who would organize the unorganized.

After the collapse of the Knights of Labor, the American Federation of Labor built on voluntarism, which was the philosophy of *freedom for unions* to work out their own problems of organization and methods. The Federation was only the governing body to enable jurisdictional disputes to be settled and to tie together the network of unions. The defeat of the socialist element in the Federation in the 90's set the tenor, too, for a type of rugged individualism in the labor movement: No political party, no class movement, and the use of economic strength—a kind of *laissez-faire* theory of labor, which was conservative enough to strike the proper chord and lift the Federation to respectability as an institution. This philosophy was driven incessantly by Samuel Gompers, who was not without his jurisdictional problems and the issue of craft v. industrial unions.

Voluntarism, while originally the idea of internal jurisdiction, became the foil whereby the AF of L demanded that the Wagner Act be amended. Currently, voluntarism means that not only unions but also the workers determine for themselves what form they desire their labor organization to take. The AF of L plea was that Board determination of the unit meant the complete overthrow of a long and historic implement of democracy and that men must choose for themselves. But the cases and statistics do not indicate any overthrow of democracy or any rupture of voluntarism; rather, the AF of L's proposed amendments were part of the campaign by the AF of L leadership against the CIO. The strategy of the AF of L was a defense strategy. One way of insuring the maintenance of the *status quo* was to have a law whereby any one person, or small group, or large group could constitute itself a bargaining unit; thereby prestige would not be lost, and a foothold would be assured despite the strength the CIO might be able to muster in any local area of conflict. Therefore, the clamor by the AF of L against the Board's alleged bias and maladministration was a necessary part of the drive to amend the Act. From the time the Board recognized the CIO as a separate

and independent organization, the Board was said to be ruining the structure of American trade unionism; yet the AF of L continued to use the facilities of the Board.<sup>7</sup>

It is probably too much to say that the Board made no errors in the determination of the unit. But such unit determinations as might be designated as errors were not engendered by a desire to aid one organization as against the other, and in those cases protested by the labor organizations on grounds of bias the Board could point to a picture distorted by an absence of facts in presentation or could show that a reasonable interpretation had been made of the facts in the case. It is trite to say that there are differences in the application and interpretation of laws to facts; but the important consideration is whether there was arbitrary and unreasonable action by the Board in determination of the unit. This is important because, through its power to determine the unit, the Board possesses the power to determine the direction of the labor movement.

It is true that men should determine for themselves the form their organization shall take and who their representatives shall be. But "self-representation" as visualized by the AF of L and "self-representation" as visualized by the Board are different concepts. The "self-representation" of organized labor is a vestige of voluntarism; but "self-representation" was to the Board the problem of deciding how small the unit could be so as best to maximize benefits and effectuate the policies of the Act. Actually, both concepts of "self-representation" flow from a more fundamental problem which occurs and recurs throughout the series of questions arising from the Wagner Act: *How shall minorities be treated?* This was the real problem in the closed-shop issue; it is the essence of the majority-rule debate; the run-off election revolved around the minority issue; and the unit problems were all based on minorities. In its broadest connotations, this problem of minorities attaches to all group political and economic action; and it is a problem which public control must always meet.

A part of the philosophy of voluntarism was job control, the traditional approach of American labor, in contrast with the class

<sup>7</sup> In 1938 the AF of L filed 85 per cent of all cases filed with the Board as compared with 53 per cent filed by the CIO. In 1939 the percentage filed by the AF of L rose to 43.3, and that by the CIO fell to 42. Smith Hearings, Vol. II, No. 2, p. 446.

background of other labor movements. Nothing in the Wagner Act or its administration impinges upon this historic method of action. Indeed, the Board and Act reenforced this doctrine of job control, for the Act recognizes that the worker should have equality of bargaining power. And the Act recognizes that free choice of representatives is a right to be protected, which means more, not less, control of the job.

While this increase of emphasis on job control flows from the Act, there is another force working in the opposite direction which, to the AF of L, must represent a destructive force against the voluntarism preached by Gompers: The danger brought by the intellectuals, who have always been feared as "Labor's fool friends." The Federation has always felt competent to stand with any institution of a capitalist society, as indeed it has been. And though the Federation was instrumental in the legislative enactment of Section 7(a) of the N.I.R.A. and though its leadership fought for the Wagner Act, the Federation did not foresee the split in the labor movement. The Federation supported the Wagner Act only to destroy an obstacle of long-standing irritation, not to create an entrée whereby the "intellectuals" could command the labor movement. The traditional economic approach of the American labor movement and of the Federation even now resents any "class" basis for the labor movement, and to invest in the hands of an administrative agency the power to influence the labor movement and to have the administrators render decisions which run counter to Federation objectives seem the large-scale realization of the Gompers' warning on the "intellectuals." It is this tie between the old and the new that made worse the Labor Board's position: The Federation leadership clings tenaciously to the doctrines laid down by Gompers, and it hews to the "voluntarism" philosophy with ardor. At the same time, the CIO rides the up-swing of the New Deal and becomes a powerful labor organization while snubbing doctrines laid down by Gompers. The CIO, engaging openly and abundantly in politics, deflated the philosophy of old. The Federation was always in the heat of every political campaign, ready, for a price, to be the weight which would shift the balance of power; but it had never, except for the La Follette campaign, attempted to emulate the campaign characteristics of political leaders. With the CIO, however, came

also a political movement, which, if successful, would mean a weld of labor to form an articulate mass to make demands upon the body politic. Success in this venture might be the entering wedge for the destruction of job control as an American method and the substitution of the "class" warfare. This, too, must be kept in mind when considering the Federation's criticism of the Board and the Act.

The criticism emanating from the AF of L came primarily from the Executive Council. The rank and file of the Federation did not enthusiastically support the AF of L amendments or the criticism of the Board. International unions, locals, and state federations went on record against the proposed amendments, as did the International Ladies' Garment Workers, one of the largest of the independents, and the Brotherhood of Railway Trainmen.<sup>8</sup> Mr. Woll, of the AF of L, who was the "crown prince" under Compers, headed the Resolutions Committee at the 1938 AF of L convention. Mr. Hutcheson, Mr. Frey, Mr. Wharton, all are of the Compers tradition; and all are powerful AF of L leaders. An examination of the position of each indicates that the *form* of organization is not the important element: Mr. Frey scoffs at the "craft" notion; Mr. Hutcheson's union of, presumably, carpenters is flexible enough to include all who desire to join; Mr. Wharton organizes machinists as crafts and also sets up locals for the unskilled. A consideration of the conflict in organized labor can lead only to the conclusion that the Board was the victim of an exaggerated jurisdictional and leadership dispute. This conclusion is supported by the testimony of Mr. Green before the House Labor Committee when the Wagner Act was being considered:

MR. RAMSPECK: ". . . Suppose you have in the automobile industry a dozen different organizations, . . . how are you going to determine the organized majority rule in those cases, unless you organize an industrial union?"

MR. GREEN: "That is . . . left entirely with the Board."

MR. RAMSPECK: "Then, under this bill as you construe it, the Board could say, if you had a factory, we will say, where there were half a

<sup>8</sup> S. Hearings on N.L.R.A., Part 14, p. 2637; Smith Hearings, Vol. III, No. 6, pp. 261 ff.

dozen different craft organizations, the Board could say, 'We won't use any one of those; you must organize an industrial union.'

MR. GREEN: "Yes; they can say whether it shall be a plant or craft unit. That is within the power of the Board to determine, just what would be a matter of convenience. For instance, there might be in the same plant a group of skilled workers that would want their own representative, one who was acquainted with their problems, trained and experienced to represent them in collective bargaining. They would hesitate to delegate that power to some untrained group. They would appeal for an election in this unit. Well, if they could present convincing facts that would justify their position, the Board is given authority to say: 'Now, you hold an election in your unit and select your representatives and we will recognize the representatives selected by a majority of your unit.' It confers broad powers, elastic powers, on the Board so that they can meet any unusual situation that might come up in a practical way. It contains those provisions in order to make it a perfectly workable measure.

MR. RAMSPECK: "Is it your construction under a situation such as I have described, that the Board can say, 'We won't recognize any but a single union'?"

MR. GREEN: "Yes, it could say that. The Board could lay that rule down."<sup>9</sup>

## B. The CIO

Since the CIO was the aggressor in the sense that it not only organized unorganized workers but also attempted to divert AF of L members to its own ranks, it would be expected to oppose the AF of L amendments. It not only opposed AF of L amendments but criticized the Board and announced that it would seek amendments if the Board did not refuse requests for separate craft units, except when there was an established craft union with a history of bargaining.<sup>10</sup> This criticism was directed more at the AF of L than against the Board. The tactics of the CIO may also be described as defensive, since any limitation on Board action would mean the CIO would spend most of its organization efforts opposing the AF of L. This left the Board wedged between the two organizations.

<sup>9</sup> H. Hearings on H. R. 6288, 74th Congress, 1st Session, p. 231. Italics supplied.

<sup>10</sup> CIO's 1940 Legislative Program, Publication No. 38, Congress of Industrial Organizations, p. 7.

Obviously, if the issue of separate representation is left to the majority vote of all, it would mean that whenever the CIO and the AF of L meet the result would almost always be a foregone conclusion. But the deficiencies of the AF of L's proposed craft proviso have been shown above: It is not possible to define realistically the boundaries of a craft, nor is it desirable to permit any miscellaneous group to set itself up as a craft. The alternatives are: (1) to leave the unit determination with the Board; (2) to follow the suggestion of Mr. Lloyd Garrison of the University of Wisconsin Law School.

### C. The Garrison Proposal

Because of his experience in the field of labor relations and his membership on the first National Labor Relations Board, Mr. Garrison merited attention when he appeared before the congressional committee investigating the Board.<sup>11</sup> Mr. Garrison praised the Act and the accomplishments of the Board, pointing to the prevention of strife through Board decisions. The Board, in his estimation, had performed public service for which it deserved credit, although the unit controversy obscured the Board's importance. But Mr. Garrison was concerned with the barrage of criticism against the Board; and, fearing the Act might be repealed in some effective manner, he proposed that the Board be relieved of the odious task of determining the unit because of the "inherent limitations" of the Board.<sup>12</sup> No formula, he thought, which the Board might lay down would please both sides; Congress could not write in a formula because the nature of the problem rendered legislative generalization invalid; the courts were not competent to deal with the problem; a five-man board would be of no help; therefore Mr. Garrison would have the Act provide "that where there exists a substantial dispute as to the appropriate unit or units between two or more labor organizations not dominated, interfered with, or assisted . . . , having members among the employees concerned, no decision as to

<sup>11</sup> Smith Hearings, Vol. II, No. 13, pp. 493-508.

<sup>12</sup> Mr. Nathan Witt, then Secretary of the Board, had made the same suggestion some time prior.

units shall be made except in accordance with an agreement between the respective organizations."<sup>13</sup> Thus, there would be no election where the AF of L and the CIO conflicted unless the two organizations themselves decided on the unit. The majority rule would remain unchanged and would apply only when one union was seeking certification or when two or more unions had agreed on the unit and sought certification. Mr. Garrison believed that his amendment would act as a lever to force the unions to agree and also that most of the criticism levied against the Board would disappear. It was also thought that there would be an improvement in the judicial atmosphere and that the labor movement might better learn to solve its own problems.

The force which would presumably drive the two organizations to unit agreement would be the freedom of the employer not to bargain collectively until the Board certified the representatives. If the rank and file of the CIO and AF of L have no great friction, then it is possible that the two organizations might well resolve unit disputes. But there is also the possibility of a form of "delayed gerrymandering," for though it is true that in most cases the AF of L and CIO agree on the unit issue, in those cases where they do not is exactly where they are engaging strategically for strength and position. Therefore, workers might be deprived of collective bargaining because of the organizations. To permit this would be a repudiation of the Act's purpose, which was to bring benefits to the workers, not the unions. The employer could bargain with each union as representative for its members only; but it does not appear that he would have to do so and in many cases, of course, would not. Too, the proposal invites the unions to make use of their economic strength, through strikes, in an effort to get the employer to bargain with them even for their own members. A real danger would likewise be that the employer could set up a dummy union with which to bargain and create a fracas; and although a charge of discrimination would perhaps be brought eventually, in the meantime the independent organization might well be ruined. The proviso offered would presumably prevent a closed-shop contract if the opposing union had any members at all. This would be unsatisfactory to the unions and

<sup>13</sup> Smith Hearings, Vol. II, No. 18, p. 499.

would still bring a demand that the law should be changed. The problem would remain but would be transferred from the Board to some other body, such as Congress.

The real unit problem came where the organizations could not agree. In over half the cases where the CIO and AF of L were involved there was agreement between the two organizations.<sup>14</sup> Would a threat of no collective bargaining overcome the other difficulties that might arise from the Garrison proposal? Any such proposal should consider that the Board election machinery is now the only available method whereby such disputes can be settled. If the "no bargaining" threat failed to bring agreement, the Act would be vitiated.

A more serious reason for not adopting the Garrison proposal is that organized pressure would be successfully using the tool of disrepute, misrepresentation, and recrimination to force a change in the duties of a quasi-judicial agency. This would not augur well for the future, since any disgruntled group might well try such attack against other similar agencies.

While not forgetting that the Act is to guarantee freedom to workers, there is a broader and more important interest involved than that of the workers and the unions: the public interest. The public has suffered in the past, out of respect for the right of workers to use their strength in jurisdictional imbroglios; and the public may rightfully, through a proper agency, settle a dispute that basically is the same jurisdictional problem that has always plagued organized labor and worked hardships on employers, employees, and the public.

Mr. Garrison's proposal, based on the "inherent limitations" of the Board, emphasized the characteristics of the American labor

<sup>14</sup> The following statistics illuminate the position the Board was placed in by the "unit" criticism.

Between the occurrence of the split in the labor movement and Feb. 6, 1940, there were 1964 unit determinations which required no Board determination of rival claims. Of these, 1508 were settled by consent election. Surely the Board can have no influence in these cases, for agreement on the unit is implicit. In 269 decisions, neither the AF of L nor the CIO was involved as a party. In 187 cases, the AF of L and CIO were both involved; but there was agreement, substantial or complete, as to the appropriate unit. In only 114 cases, or roughly six per cent, was there substantial disagreement by the organizations on the unit; and only in these six per cent of all cases could the Board enter to influence the form of organization. But Board decisions in these few cases fell very fairly, and even here there was no consistency in the claims of the organizations as to the unit requested. See Board Press Release R-2605.

movement and not the failure of the administrative process as such. Any judicial or quasi-judicial body inevitably creates areas of dissatisfaction and criticism. The acrimonious criticism levied against the Board must be regarded as a reflection of the unique American labor history in contrast, for example, with the English labor movement. The more complex English movement has a class basis which binds divergent elements to the resolution of jurisdictional issues. One English organization would never charge that another organization would prefer that there be no collective bargaining rather than have its competitor do the bargaining. And where, in England, there are competing unions in the same plant, they jointly bargain. Union competition for members is strong, but the competition is conducted on a high plane. Two rules are followed: (1) Any worker can join any union which can first get him, which means no shibboleth of "craft v. industrial unionism"; (2) once the worker joins one union, no other unions seek to entice him away until he resigns as a member in good standing. Thus, the English movement is not primarily concerned with jurisdiction as is the American one. In the United States the competition has been and is to gain entrée to the plant or area alone, to assert jurisdiction, and later to consider union membership. Until recently, the main influence of the American movement has, of course, been the Federation; the propelling forces have always been jurisdiction, exclusive bargaining rights, and majority rule; and these characteristics are anchored in the philosophy of voluntarism. It is, therefore, understandable why Board decisions, which impinge upon union autonomy, bring criticism. And though there are inherent limitations to the Board's ability to satisfy the unions as organizations, this does not justify changing the Act when the alternatives present no probable beneficial results and when the Act was meant to operate only indirectly, if at all, to the benefit of unions.<sup>15</sup>

<sup>15</sup> Dean Garrison believes the unit problem indicates that there are inherent limitations of law which prevent satisfactory settlement of the unit problem, since the problem is fundamentally one of the internal structure of the labor movement. The determination of the unit is only a finding of fact in representation cases. It may be that there are "inherent limitations" to facts and the application of law to ascertained facts, or that the law fails, in some "marginal" areas, to resolve conflicting claims. But if so, is the whole control approach wrong? Is there any reason to believe that "inherent limitations" are more pronounced in the field of labor-management relations than elsewhere? Is it not in these "mar-

The unit controversy is an example of what occurs with all "labor laws." Invariably labor struggles and supports legislation, adopts it as its own, assumes that labor is best qualified to administer the law, to criticize its application, and to recommend its modification. This has surely been true of the Wagner Act, for the labor organizations have regarded it as their own private curtain of protection. The individual worker has no understanding of the Act, and only through the large labor organization can the individual have any realization of the legislation. It is to be expected that the AF of L and CIO would demand that the Board bend its decisions on the unit claims to suit them.

ginal" areas of human conduct that the law deals? cf. Max Radin, *Law as Logic and Experience*, Yale University Press, p. 28.

## Chapter XII. COURT REVIEW OF BOARD CERTIFICATIONS

Section 9(c) of the Act provides that "the Board may investigate" controversies concerning representatives of employees, and as a result of the investigation (by election or other "suitable method") the Board certifies the bargaining representative. Section 9(d) provides that, in any order issued to prevent unfair labor practices based in part or in whole upon a representation finding, the representation finding becomes a part of the transcript of record.<sup>1</sup> Thus, any decision by the circuit court of appeals presumably would include within its scope of review the investigation made by the Board to ascertain the bona fide representatives of the employees. It is specified that certification proceedings may be held in conjunction with proceedings to prevent unfair labor practices, or otherwise, but no mention whatever is made of court review of the representation certification except in conjunction with unfair labor practice cases where an order has been issued against the violator and there is petition in the courts for enforcement or review.

Section 10, which specifies with particularity the procedure for enforcement and review of Board orders, has a subsection which states that "Any person aggrieved by a *final* order of the Board . . ." may obtain review.<sup>2</sup> Since a "final order" is used only in unfair labor practice cases, the section provides no review for those representation certifications which involve no unfair labor practice proceedings. Both unfair labor practice and representation proceedings are brought in conjunction only in those cases where it is charged that an employer refused to bargain, for there

<sup>1</sup> See Appendix I, Sections 9(c), 9(d), and 10(c), 10(f).

<sup>2</sup> See Appendix I, Section 10(f). Italic supplied. Also see Subsection (e).

must be a desire by the majority to bargain, a representative, and a finding by the Board that the employer has refused to bargain with the proper representative. The representation finding of necessity becomes a part of the record in refusal-to-bargain cases; and the certification is, therefore, reviewable in that one category.

The congressional intent toward the reviewability of representation proceedings is fairly clear. The first National Labor Relations Board had a very unsatisfactory experience in representation proceedings. Under Public Resolution No. 44 there was court review of representation proceedings prior to the actual election or ascertainment of representatives. The result was that employers would prevent elections by legal recourse to the circuit courts before the elections were even held. After almost a year the first National Labor Relations Board had been unable to hold any election where the employer had decided to fight the election proceeding through the courts.<sup>3</sup> The House and Senate both took cognizance of the weakness of court review prior to certification. The Senate report said:

“Section 9(d) makes it absolutely clear that there shall be no right to court review anterior to the holding of an election. An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of either employers or employees. There is no more reason for court review prior to an election than for court review prior to a hearing. But if subsequently the Board makes an order predicated upon the election, such as an order to bargain collectively with elected representatives, then the entire election procedure becomes part of the record [and is reviewable] . . . This provides a complete guarantee against arbitrary action by the Board.”<sup>4</sup>

The House report was in the same vein:

“. . . The [election] question will ordinarily arise as between two or more bona fide organizations competing to represent the employees, but the authority granted here is broad enough to take in the not infrequent case where only one such organized group is pressing for recognition, and its claim of representation is challenged. . . .”

<sup>3</sup> S. Report No. 573 on S. 1958, 74th Congress, 1st Session, p. 6.

<sup>4</sup> S. Report No. 573 on S. 1958, 74th Congress, 1st Session, p. 14.

"Section 9(d) of the bill makes it clear that there is to be no court review prior to the holding of the election, and provides an exclusive, complete, and adequate remedy whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an election or other investigation pursuant to section 9(c). The hearing required to be held in any such investigation provides an appropriate safeguard and opportunity to be heard. Since the certification and the record of the investigation are required to be included in the transcript of the entire record . . . the Board's actions and determinations of fact and law in regard thereto will be subject to the same court review as is provided for its other determinations."<sup>5</sup>

One may conclude that the Congress, when writing the provisions regarding the reviewability of certifications, had the experience of Public Resolution No. 44 uppermost in its mind, and the Congress desired to prevent a repetition of court review anterior to the election. Both the House and Senate defended its action on the reviewability portion of the Act by emphasizing that court review would be available whenever an unfair labor practice proceeding was involved, and congressional anticipation seemingly was that the employer would be the party seeking review. But while the House report anticipated that elections would be necessary to settle union-representation controversies, apparently it was not anticipated that union organizations would seek to have certifications reviewed. The Senate report bears out this conclusion by referring to the effect of elections on employers and employees. If, in congressional contemplation, review of certifications by the courts was to be available only for employers involved in unfair labor practice cases; if review was not for unions; if the certification was a fact-finding, advisory function of a "discovery" nature; then this conclusion is indicative of congressional intent, which may be contrasted with the Board's application of the Act.

It is reasonable to suppose that the absence of review for unions carries the implication that Congress did not foresee the use of "Neither," nor the run-off election; nor did it adequately see the unit problem. Rather, it may be reasoned that, while Congress did desire to maximize the benefits of collective bargaining, Congress foresaw only a certification based upon a straight majority

<sup>5</sup> H. Report No. 1147 on S. 1958, 74th Congress, 1st Session, p. 23.

without the "Neither" category or the run-off election. But the Congress erected a language structure which permitted great latitude of interpretation by the Board; and the Board made fullest use of the Act's possibilities, so that there was not only the protection of rights but also the active promotion of collective bargaining in order to maximize benefits for workers. However, the Board's interpretations brought issues relating to union organizations, and the rights of those organizations, that demanded resolution by the courts under the category of reviewability of certifications where no order was involved, yet where the Board determinations quite obviously did affect the status of the union. The prominent instances of the effects of Board policy were the use of "Neither," the form of the run-off election, the determination of who goes on the ballot, and the unit determination.

The reviewability, under the Act itself, of certifications, the method of determining representatives, and the finality of the Board's certifications under the Act have been the subject of court decisions in several different cases.

The leading case before the Supreme Court on the reviewability of certification proceedings was the *Longshoremen's* case, but on the same day decisions were issued by the Court in the *Consumers Power* case and in the *Falk* case.<sup>6</sup>

#### A. The Longshoremen's Case

The decisive question in the *Longshoremen's* case was whether a representation certification that a particular labor organization of longshore workers is the collective-bargaining representative of the employees in a designated unit is reviewable by procedure provided for review of representation proceedings where unfair labor practices are involved.

The Court pointed out that the jurisdiction of the circuit courts of appeal to review the action of an administrative agency was to be conferred by the legislation relating to that agency, and such legislation prescribes the manner and scope of review. But the Act did not confer such review. Review would also be proper

<sup>6</sup> Respectively, *American Federation of Labor et al. v. N.L.R.B.*, 308 U. S. 401 (1940); *N.L.R.B. v. International Brotherhood of Electrical Workers et al.*, 308 U. S. 413 (1940); *N.L.R.B. v. Falk Corp.*, 308 U. S. 453 (1940).

if the certification, apart from any unfair labor practice proceeding, was a final order. But, held the Court, the Act nowhere refers to the certification as an order. The Act, its structure, and its legislative history indicated to the Court that Congress intended that there be no review of the certification alone under the provisions for review in unfair labor practice cases; and it so held.

Before the Court, the Board had argued that the Act imposed duties only upon employers.<sup>7</sup> If the employers refused to deal with the representatives, they could do so either before or after the certification; and the certification did not change their duties in that respect. Court proceedings for violation of the unfair labor practices proscription would still be necessary to compel the employer to bargain with the certified representatives. The certification was argued to be only in the nature of an announcement that the agency would probably entertain unfair labor practice charges against an employer who refused to bargain collectively and exclusively with the certified representative and that there would be no proceedings if the employer did bargain. Further, the Board argued that a certification was only advisory and had no legal effect upon the rights of employers, employees, or labor organizations involved. If the certification be called an order, which it was not, still it would not be a "final order," which the Act required for review; but rather the order would be in the nature of the nonreviewable type discussed in the *Rochester Telephone* case, wherein "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action."<sup>8</sup>

The Court refused to attach importance to the fact that the certification itself did not command action, for administrative determinations which are not commands may, it was said, for all practical purposes determine rights as effectively as a court; and they may be reexamined by the courts under statutes providing for review of orders. But, out of consideration for the Act's purpose and legislative history, the Court held that it was clear that Congress meant to provide no review in representation pro-

<sup>7</sup> The Board's argument is drawn from its brief before the Supreme Court.

<sup>8</sup> *Rochester Telephone Corp. v. U. S.*, 307 U. S. 125 (1939).

ceedings under that provision covering review in representation proceedings.

The Court expressly left open the question as to whether equity proceedings were foreclosed by the Act. It was held that the answer to that question involves a determination as to whether the Act, insofar as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction, and that was to be answered only upon a showing that unlawful action by the Board inflicts an injury for which the law, apart from the review provisions of the Act, affords a remedy. Such question was not presented in this case.<sup>9</sup>

That a schism in the labor movement brought difficulty for the union organizations so that a review of the certification might be in order was indicated by Board argument before the Court and by the Court itself. The Board argued that the intent of Congress was to have no judicial review of certifications; but it also said that if recent developments in the labor movement were persuasive that certifications should be reviewable at the instance of union organizations, it was for Congress to reconsider. The Court said the fact that Congress may have been mistaken in its judgment that the review provisions of the Wagner Act provided a complete safeguard against arbitrary action did not warrant an extension by judicial construction of the jurisdiction of the circuit court of appeals to review acts of the Board. If hardships followed, pleas were to be addressed to the Congress, not to the courts.

### B. The Consumers Power Case

The *Consumers Power* case involved the same issue of reviewability, but the case arose from the Board's form of ballot in the

<sup>9</sup> The circuit court of appeals for the District of Columbia, in upholding the Board in the *Longshoremen's* case, suggested that the AF of L might obtain relief in an independent suit in equity commenced in a district court. The AF of L filed suit in the district court for the District of Columbia for a mandatory injunction to compel the Board to withdraw its certification, *AF of L v. Madden*, Civil Action No. 2214. This suit was continued until the Supreme Court decision in the *Longshoremen's* case in January, 1940. Shortly thereafter the AF of L moved the district court to dismiss Civil Action No. 2214, which was done. The AF of L then began another suit in equity in the district court of the District of Columbia, *AF of L v. Madden*, Civil Action No. 5517. On July 10, 1941, both parties presented the court with a stipulated petition to dismiss.

run-off election. The case questioned whether only the leading labor organization was to be placed on the run-off ballot. The Court, citing the *Longshoremen's* case, noted that the decisive question was the reviewability of the Direction of Election under that portion of the Act providing for review of representation proceedings in unfair labor practice cases. It was held that Congress excluded such representation proceeding from review before the courts; and since the Direction of Election was but one step, it, too, was excluded from court review.

### C. The *Falk* Case

In the *Falk* case the reviewability issue was also concerned with the Direction of Election, but the issue was whether a disestablished union could go on the ballot. The circuit court of appeals had modified the Direction of Election, which had been made in conjunction with an unfair labor practice finding. In reversing the circuit court, the Supreme Court held that the Act vested power in the Board alone to determine what union the employees desired as bargaining agent, if any, and the circuit court was without power to review a proposed election. No court review was available until the Board issued an order and required the employer to do something predicated upon the result of an election.

### D. Should There Be Review?

The congressional intent and the Board's approach toward reviewability are persuasive but not conclusive. True, the certification does not add to the employer's duty to bargain, for it exists regardless of whether there has been a certification. Indeed, an employer can bargain with any group either before or after a certification, and unfair labor practice proceedings would be necessary to compel the employer to bargain with the certified representatives. And then there would be court review of the certification, so that employers always have reviewability. True, the certification is not an enforceable order. Nor does it have the binding force or compulsory effect of a final order. It does not do legal injury to a competing union's rights, for any union

can be chosen by the employees. Too, review might well prevent collective bargaining and bring injury to employees generally and to the public interest through prolonged litigation. An employer might use legal tactics to prevent collective bargaining. But competing labor organizations too, or even an individual employee, could engage in legal strategy to promote competitive positions. If there were review, the time necessarily involved would mean changed factual situations, so that the Board would, at the end of each review, be faced with an endless series of *de novo* proceedings.

Nevertheless, through its discretion in the certification process, the Board can seriously affect the position of labor organizations. The fact that the Board's performance has been demonstrably the very opposite of arbitrary action is no guarantee that the future will always see a Board genuinely interested in impartiality. Changes in Board membership may bring different policies and interpretations which would affect the position of unions, and there would still be no recourse under the Act.

Whether there should be court review of certification proceedings not related to unfair labor practices is really the problem of ascertaining where, for the public interest, there lie the greatest advantages, or the least disadvantages, as a result of the possible alternatives. On the one hand, not only might employers by the use of legal tactics prevent the development of collective bargaining if there be review provided, but union organizations and minority groups themselves might grasp the use of legal tactics in order to serve their own strategic purposes. On the other hand, by investing complete discretion and abundant power in the administrative agency, there is the risk that arises from possible partiality, "strange" beliefs, "wrong" interpretations, and the intellect, experience, and knowledge of Board members of the future if no certification review is available. The Congressional choice between these alternatives was probably sound because in this area the greater good is served by ending litigation, even though in particular cases injury may thereby be done. And if, as the Board argues, the Act precludes judicial review of a certification made by the Board not otherwise arbitrary or unreasonable, then reliance must be placed upon public opinion to police the agency.

*Part Four*

The Procedure of the Board



## Chapter XIII. COMPLAINT CASES

### A. The Charge

The Board begins proceedings in unfair labor practice cases "whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice . . ."<sup>1</sup> Any person or organization may bring a charge to the Board. Almost always the union brings the charge, which must be sworn, notarized, and in written form. The charge ordinarily is filed with the regional director in the region wherein the alleged violation occurred. The Board, however, reserves the right to permit charges to be filed directly with it in Washington and the right to transfer the charges to itself from the regions; or it may consolidate cases within the same or different regions.<sup>2</sup> Although the charge was not defined in the Act, by regulation and form the Board gave the charge legal stature and defined it to be the first stage whereby proceedings are initiated.<sup>3</sup> The initiation of the Board proceeding comes with the issuance of a complaint, the basis for which is the charge and the facts discovered in the consequent investigation.

Although, technically, the Board's formal proceeding begins only with the issuance of a complaint, an extremely important portion of its work is accomplished in the charge stage; for, while there is a statutory demand that a charge be filed before a complaint issues, there is no statutory requirement that prevents

<sup>1</sup> Appendix I, Section 10(b).

<sup>2</sup> N.L.R.B., Rules and Regulations, Series 2, Article II, Section 3. Charges filed directly with the Board in Washington are negligible in number—less than ten each fiscal year. Once filed, these cases are handled in the same way as others.

<sup>3</sup> Presumably, the Board could have relied upon an oral charge. It was felt, however, that for formal procedure the written charge would be superior and, at the same time, would cause the person bringing the charge to think, analyze, and digest the charges more acutely. It was felt that there would be fewer unfounded charges.

consultation or Board inquiry among and between the parties prior to or after the issuance of a charge but before the complaint issues. In this, the Board has been successful in disposing of cases or issues in an informal manner without the issuance of a complaint. Despite such success, the Board was severely criticized for consulting with union members, union leaders, and individuals before a charge had been filed. The implication of such criticism was that the Board not only prejudged the case which was to follow but that it also deliberately created trouble.

The Board does not often enter into an investigation prior to the receipt of a charge, but it almost always offers and renders its advice on the filing of the charge itself. It may even furnish the forms and specify the general contents for the charges.<sup>4</sup> The Board encourages the regional directors to render all possible aid to persons who desire to file charges but who, because of financial circumstances or inability to understand the legal character of the procedure, need aid. While the Board may not proceed on its own motion, and while it does not conduct "fishing expeditions," it may urge an organization to file charges if, in the course of an investigation under representation proceedings, it finds unfair labor practices. It may be that inquiry by the Board or consultation with the parties with regard to the filing of a charge leads to the epithet "trouble-maker." But as a practical matter, administration of the Act would be impossible without consultation, which is only for the purpose of facilitating the work of the Board. Too, the Board has always had ample work provided it, so that no "make-work" program was necessary.

The real issue attaching to Board consultation is the approach of the administrative process as distinct from law enforcement. Under the administrative process the public agency has a responsibility actively and positively to implement public policy, in contrast with the wholly judicial enforcement of rights through the courts. Moreover, in other agencies, such as the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission, the agency may proceed upon its own motion; and the criticism of "meddling" is at a minimum.

<sup>4</sup> The charge must contain the name and address of the person or organization bringing the charge, the name and address of the employer, and a concise statement of compelling facts.

And although the Board is not prohibited from investigating, inquiring, or consulting, it may initiate a proceeding only when a charge is filed; hence the Board is really restricted in its activity more than are other similar agencies.<sup>5</sup> However, other agencies have their entire procedure fortified by statutory authority, and this is a statutory deficiency of the Wagner Act. The attitude of the Board toward such deficiency is the only wise alternative: With a given statement of facts, the advice of the agency as to the protection of rights should be available to a complainant-to-be so that the rights may be protected. Likewise, the Board believed that it should confer with employers so that they may understand fully their obligations under the Act. The compelling thought has been that the Congress intended that the Board implement public policy and give sympathetic consideration to employees and employers troubled by problems arising under the Act, although the Board believes that it should not solicit complaints and presumes that it has no jurisdiction prior to the filing of the charge.

Closely akin to the inquiry and investigation in which the Board sometimes engages prior to a charge and the consultation with parties before the filing of a charge is the mediation and

<sup>5</sup> The S.E.C. Act, Public 291, 73rd Congress, 2d Session, 1938, Section 19, provides that the S.E.C. may proceed under its own authority with respect to exchanges and securities. Under Section 21, the Commission may make such investigations as it deems necessary to determine whether any person has violated or *is about to violate* the statute or the rules and regulations made thereunder. The Commission may even investigate in order to secure information as a basis for legislation. It may get injunctions in district courts to restrain acts which, if done, will violate the statute.

The Federal Trade Commission, U. S. Code, Title 15, Section 45, proceeds under the following grant of power:

"Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve . . . a complaint stating its charges." (Italics supplied.)

The Interstate Commerce Commission is likewise given power to proceed on its own motion or upon complaint. U. S. Code, Title 49, Section 13(2). The Commission first attempts to settle cases informally and, upon failure, then aids potential litigants in drafting a complaint. It may even draft the formal allegations and send them to the complainant for examination and amendment. *Interstate Commerce Commission Activities, 1887-1937*, pp. 54-55.

Other agencies where the injured are advised are the Secretary of Agriculture under the Packers and Stockyards Act, and the Bituminous Coal Commission, both of which engage in informal work and may proceed from a complaint or on their own motion.

conciliation work which has been engaged in by the Board. The Act prohibits the Board from appointing individuals for mediation, conciliation, or statistical work where such service may be obtained from the Department of Labor.<sup>6</sup> The Board did not infringe upon this prohibition, but the functions of mediation and conciliation have been carried on. It is to be recalled that the National Labor Board and the first National Labor Relations Board had mediation and conciliation as important functions, and the carry-over of personnel to the present Board brought an inclination to continue to adjust employer-employee differences as they arose. In a real sense, the agency had to shed a traditional function, so that the Board, chiefly through some of its regional directors, for a time engaged in extra-legal activities. The Board eventually found it necessary specifically to request some of its regional directors to cease mediation activities, although it is not clear whether the Act precludes the agency from engaging in the function.

Mediation and conciliation are but a minor part of the Board's work, partly because those functions are engaged in only when public policy seems to demand it, as in a strike situation; partly because the Board is too burdened to solicit that type of activity; and partly out of deference to the Department of Labor, whose province includes mediation and conciliation by at least the dignity of legislation and historically vested interests. Such mediation and conciliation as the Board does engage in usually are undertaken before the formal charge is filed, although the Board is endeavoring to cease such activity.

When a charge is filed, the regional director allots it to one of the field examiners for investigation. There is lack of uniformity throughout the regional offices, but usually the employer is provided with written information on the charge. The information does not specify in detail the violations of the Act, and the Board gives no publicity to the charge.<sup>7</sup> The investigation proceeds on two bases: (1) Is the concern one which is sufficiently related to interstate commerce to come within the jurisdiction of the Act? (2) Assuming the Board has jurisdiction, does the charge have

<sup>6</sup> Appendix I, Section 4(a).

<sup>7</sup> In answer to criticism that no copy of the charge is sent to the employer, the Board's reply is that the charge has not yet been substantiated. The employer is always apprised on the substance of the charge either orally or by letter.

merit? The jurisdictional question was more important early in the Board's history but has become less so as the courts have sustained the Board's jurisdictional findings in almost all cases. Employers often do not question the Board's jurisdiction; and, if necessary, the regional director or field examiner may call upon the Board for supporting material to settle the question of jurisdiction. If the regional director finds the Board has no jurisdiction or that the issues involved have to do with problems over which the Board has no control, he will so advise the person or organization filing the charge and request that the charge be withdrawn. If it appears that the Board has jurisdiction, however, and if it appears that there is some degree of merit in the charge, the field examiner endeavors to arrange a conference at which each of the immediate parties is given opportunity to state his position on the issue involved. The conference not only speeds up the investigation; but, of more importance, it often enables an adjustment of the issue to be resolved. The parties may agree to a settlement; the facts brought to light may indicate the charges to be ill-founded; or the conference may verify that, in the absence of a settlement, a formal hearing would be justified. In a relatively few instances the conference is not possible because of geography or antagonism between the parties; and often the conference does not complete the investigation, in which event the field examiner proceeds with the investigation via interview and even perhaps an inspection of various books and documentary material of the employer in order to ascertain facts needed to determine the validity of the charges.<sup>8</sup>

Through his investigation the field examiner may become convinced that the facts do not justify the charge. He then suggests to the party bringing the charge that it be withdrawn. He will

<sup>8</sup> The Board has the power to subpoena evidence for investigational purposes and has been compelled to do so in some "50 or 60 cases." In such cases the field examiner or regional director must have Board approval, for the Board has endeavored to refrain from all compulsion prior to the issuance of a complaint. Thus the conferences are wholly voluntary, and to make conferences compulsory would militate against the disposal of cases by informal methods. The closeness with which the subpoena power has been held has been reason for objection by the regional director that there is too much centralization and not enough confidence placed in the regional director. See Smith Hearings, Vol. I, No. 10, p. 342; Monograph No. 18, *National Labor Relations Board*, The Attorney General's Committee on Administrative Procedure, Dept. of Justice, p. 11. References from the Monograph will hereafter be cited, "Monograph No. 18, p.—."

also suggest withdrawal if it appears that the supposed violation could not be substantiated at a formal hearing. If the party refuses to withdraw the charges, the regional director, upon review of the entire file, may refuse to issue a complaint and dismiss the case. This step would come only after conference with the field examiner and probably also a conference with the complainant.

In the event the charge is dismissed, the regional director notifies the parties by letter concerning the action. The letter sent to the complainant informs that under the rules Board review may be sought if filed within ten days, although the time limit has not acted as a bar when extensions have been requested. The letter to the complainant merely states that the investigation does not reveal a strong case and does not state exactly why the regional director is refusing to proceed. This is done because the Board does not wish to set precedents, and the Board believes that for reasons of administrative policy it is justified in not making public its refusal to entertain charges as a basis for a complaint.<sup>9</sup>

Lack of merit and lack of jurisdiction are not the only reasons that have caused the Board to dismiss cases. Early in its history the Board pressed cases that were strong on the grounds of both merit and jurisdiction. Some regions, immediately after formation of the Board and until constitutionality was upheld in 1937, did not encourage the filing of charges because it was felt that, by narrowing the scope at that time, the Board could better establish itself on a judicial basis. Hence none except the strongest cases were accepted; or, if accepted, they were not pressed with vigor. The Board has always taken the approach that the leading

<sup>9</sup> The Board not only does not wish its jurisdiction limited but also does not desire the letter to indicate that the reason for the dismissal is lack of merit. The letter makes no reference to the closing of the case, nor does the form letter indicate a four-week review period. Instructions by the secretary to the regional director permit a case to be closed at the end of four weeks if no appeal is taken to the Board. If appeal is taken, the case is closed when the Board upholds the regional director; or a complaint is issued if the union's appeal is upheld and the case continues.

The addition to the form letter of the notice of the ten-day review period was not included in the instructions from the secretary to the regional directors, Feb. 2, 1939. At that time, the letter was to make no mention of any period of review, although this deficiency was later corrected. The time period is not stated in the rules (Series 2, Article II, Section 9), and the Act makes no mention of review of charges dismissed by regional directors. Review exists at all only because of Board discretion.

concerns and the strongest cases should receive the fullest attention of the Board and that the "peanut" cases of the unions should not be entertained. This approach is the allocation of limited resources so as to make the largest possible impression in the belief that the winning of important cases against leading concerns within an area will bring compliance with the Act and lessen the burden of the Board. The courts, too, have always been on the horizon, and the Board has been cognizant of the importance of winning court cases.<sup>10</sup>

If the regional director has dismissed the charge and the party appeals to the Board, the complete file of the case is sent to Washington so that the appeal papers and the case file are available for the reviewing process. While for some years the appeal was considered by the review division or the litigation division, reorganization, which had begun with the appointment in March, 1940, of a chief administrative examiner, finally settled that appeals would go to the Board through the Authorization Committee. This was accomplished in the early months of 1941 and in part resulted from a recommendation by the Attorney General's Committee on Administrative Procedure. That recommendation

<sup>10</sup> In July, 1938, the Board secretary sent a memorandum to all regional offices. In it he emphasized the need for reducing the number of cases going to the hearing stage because the load was more than could be handled in Washington. The court record was also a consideration. More informal settlements were urged, as well as a limitation placed upon the number of cases going to the hearing stage where no settlement was reached. The policy was to limit cases which were to go to hearing to those cases which were strong jurisdictionally or strong on the merits and also to those which would constitute "key" cases in an industry or region. It would follow that the cases involving employers of a large number of employees would merit a hearing, although as a mechanical matter it would also be likely to mean a long hearing, and such cases should be settled. At that time the Board was mainly concerned with getting itself accepted, but still it was attempting to extend the jurisdictional boundaries.

The union organizations were largely responsible for the burden and for the consequent necessity of the Board's urging the regions to use more acumen in the selection of cases to go to hearing. The CIO in September, 1938, circularized its organizations to adopt the strategy of getting cease and desist orders against important employers in the territory so that violations by other employers would cease. Too, the CIO legal counsel urged that charges not be elaborate so that there could be a quick decision followed by a contempt order in event of the employer's failure to comply with the Board order. The Board secretary approved the CIO move to simplify cases. The unions finally did simplify their charges and exercised greater strategy in selecting the cases to bring to the Board. Smith Hearings, Vol. II, No. 17, pp. 692-693, 705-706.

The insistence of the Board that the union furnish tangible evidence and the insistence on fewer cases meant better investigation of cases and hence better records.

was that appeals should be considered by the same authority that passes upon requests for complaints, since the issues involved are similar.<sup>11</sup>

Almost always the Board's decision on the appeal has supported the recommendation of the regional director.<sup>12</sup> If the Board upholds the regional director, the case is dismissed; while if it upholds the party appealing, the regional director will request authorization for issuance of a complaint.

If the charge is dismissed by both the regional director and the Board, there is apparently no judicial recourse.<sup>13</sup> If there were judicial review in this area, then all withdrawn and dismissed cases would constitute potential litigation; and not only would the realization of such additional litigation greatly handicap the enforcement of the Act, but it would also throw the issues into the hands of the courts, which are wholly unsuited to handle highly technical problems demanding specialized tribunals. For example, if review were available through the district courts, the law would be developed through some 200 courts instead of through a specialized tribunal; hence continuity and uniformity of treatment would be an impossibility. Congress well realized such a possibility after its experience with the first National Labor Relations Board.

Because credibility and substantiality of evidence would be involved in most cases, the courts might find it difficult to refrain from de novo proceedings, which would ignore the *raison d'être* of the Board and of specialized tribunals to cope with technical situations. In truth, there always exists a danger that the Board

<sup>11</sup> Monograph No. 18, p. 14; H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, pp. 527-528; Board Press Release R-4073.

<sup>12</sup> Four thousand six hundred and eighteen unfair labor practice cases were filed in the fiscal year ending June 30, 1939. One hundred forty-three petitions were filed with the Board for review of charges dismissed by regional directors. Of these, only seven were sustained. Fourth Annual Report, N.L.R.B., p. 31, and Monograph No. 18, p. 15. The Board does not uphold the regional director's dismissal just because it is the regional director's; rather, the record bespeaks the caution of the regional offices.

<sup>13</sup> *Rochester Telephone Co. v. United States*, 307 U. S. 125 (1939). The Supreme Court there laid down two governing principles for the review of administrative orders: (1) If the issue is one demanding expert and technical knowledge, a court may not be involved until the agency passes on the issue; (2) under the doctrine of administrative finality, the judgment of the agency must stand if there is "warrant in the record for the judgment of the expert body," that is, if the record supports the agency's conclusions.

will err by dismissing a meritorious case; and there is no manner in which an employee or a union can compel the Board to say that there is a case. This danger, which appears to be slight, is to be balanced against the advantages accruing to the public through use of the flexibility and expertness of the administrative process. Any possible public disadvantages that may accrue because of the Board's failure to prosecute probably are far outweighed by the advantages which accrue by the use of the Board rather than the courts.

The field examiner may conclude from the investigation that the charges have merit. Before issuance of a complaint, the regional director attempts to adjust or settle the case. Such an adjustment makes no use of the stipulation but is wholly informal, and the objective is virtual compliance with the spirit of the Act.<sup>14</sup> "Virtual compliance" is likely to require the utmost skill of the regional director. In order to adjust the case informally, he must probably insist upon less from the employer than a Board order would require. If, however, the director yields too much to the employer, the union has reason to protest that it is not receiving the protection of the Act. The Board attempts to obtain as much employer performance as would be obtained if the formal order were to be relied upon; and settlements may, therefore, contain back-pay agreements, provide for the disestablishment of company unions, include the recognition of the representatives of the majority for purposes of collective bargaining, or require the posting of notices.<sup>15</sup> Realistically, the director probably will insist upon as much performance as he thinks he can support in court. As a "minimum," he will endeavor to have the employer post notices that the employer will not engage in unfair labor practices and that employees' rights will not be violated.<sup>16</sup> The

<sup>14</sup> In rare instances the adjustment will provide for a Board order, in which event the complaint issues and the formal order follows.

<sup>15</sup> Regional directors and field examiners may point out to the employer the financial burden of opposing the case through its various stages. From this practice sprang some objection that the Board agents were using the "financial cudgel" to conclude settlements. Such action by Board agents may be construed either as a cudgel or as a device to aid the employer. The chief trial examiner, when acting as a regional director, pointed out to respondents (1) that the cost of a hearing would be heavy and (2) that it was in everybody's interest to settle cases. The first statement was not used as a lever on the second, although both statements were true.

<sup>16</sup> Smith Hearings, Vol. I, No. 10, p. 350.

agreement reached is usually reduced to writing at Board insistence. It is signed by the employer, the complainant, the field examiner, and the regional director; and it states in detail what each party agrees to do. In this process the regional office has complete independence, and Washington is voluntarily consulted by the regional director only in difficult cases. A copy of each written agreement and of the notice to be posted is sent to the Board secretary, and all closed cases are reported in full in order that the regional directors may be subject to control from Washington. This is to assure uniform policy on the settlement of similar issues.

The charges are withdrawn upon employer performance; but should he fail to perform according to the terms of the agreement, the only effect would be the delay of the case. Ordinarily the case is regarded as closed when the employer offers proof of, and the complainant affirms, performance.<sup>17</sup> This settlement process does not aid the Board in the enforcement of the Act, since the agency obtains no additional legal basis upon which to prosecute a violation; yet the large number of settled cases affirms the procedure.

In the event a case is dismissed or the Board refuses to issue a complaint, the employer is notified at the end of the four-week period, which marks the expiration of the appeal period. If the complainant has appealed the case to the Board, the employer is notified from Washington if the Board sustains the regional director's refusal to issue a complaint. If the union withdraws the charge without an adjustment being reached, the employer is notified by a letter which states that the union has withdrawn the charge. The letter does not state that the case is closed. If the charge is withdrawn because an adjustment has been reached, the letter will state that the charge has been withdrawn, usually under the terms of the settlement, and will be sent to the employer when he performs. It may be noted that in dismissals, withdrawals, and settlements, the letter to the employer does not state that the

<sup>17</sup> The case could be closed by the Board without the union's withdrawing the case, but public relations require the Board to work closely with the unions. Just as proper labor relations are not encouraged by employers' being haled into court, neither is a union content unless its welfare is solicitously cared for; hence the regional directors endeavor to balance the two forces. Unions are sometimes "stubborn" and "careless" and fail to withdraw the charges even though content with the settlement made.

case is closed but reads only that "Further action in the above matter is not contemplated by this office at this time."<sup>18</sup> This failure to state to the employer that the case is "closed" has received severe criticism, even from the Board's own regional directors, for such failure left the "Sword of Damocles" hanging over the employer. The Board, it was said, needed to give an appearance of less secrecy and to take responsibility for its decisions, since no employer desires to be left in suspense as to the likelihood of a complaint. While such tactics may represent one means of obtaining compliance with the Act, upright administration of a law would not condone such methods. It is difficult to understand why the Board, until February 2, 1939, did not give the employer *any* information as to the disposal of charges not followed by a complaint. Sound public relations would seem to thrive in full knowledge rather than in an environment of secrecy, yet the Board apparently assumed that the employers could best be handled when there was less than full information and when there was a continual legal threat.

The Act contains no statute of limitations, and the Board has at times been confronted with "stale" charges. The absence of time limitations makes possible a severe financial penalty against an employer if an employee were to bring charges of discrimination and the Board were to issue a back-pay order. In order to prevent such an occurrence, the Board has for some time imposed in effect a six-months limitation on the filing of unfair labor practice charges. The Board has issued instructions that whenever an unfair labor practice is supposed to have occurred prior to six months preceding the charge, the burden is on the person bringing the charge to show reason for delay in filing the charge; and a burden is likewise placed upon the regional director, who, if he requests that a complaint issue, must be prepared to give sound reasons in view of the late date. In any event, the Board has control over such cases in that it may refuse to issue a complaint; or, if a complaint is authorized and if the employer is found guilty of violating the Act, the Board may not require back pay. This flexibility is desirable. Any statutory limitations would probably be

<sup>18</sup> As of January 1, 1940. Prior to February 2, 1939, the employer received no notification at all of a formal kind as to the disposition of charges not followed by a complaint. See Smith Hearings, Vol. I, No. 10, pp. 342, 350.

either a fraction of all other legal limitations or else would not improve the above situation. It is incumbent upon the Board to exercise discretion, judgment, and good faith in accepting old cases.

### B. The Complaint

If settlement efforts fail and the investigation indicates that the charges have merit, the regional director will request authority to issue a complaint. The request, which is in effect a statement of the *prima facie* case which the Board expects to prove in formal proceedings, is prepared by the field examiner who conducted the investigation. The regional director, who, through his settlement efforts, will know both sides of the case, must sign the request and append a statement of his opinion as to the evidence and issues. The statement also presents the position of both the complainant and the respondent. For the first few years the requests did not contain the employer's side of the controversy, but that deficiency was corrected in 1938. The statement also summarizes the steps taken to settle the case on an informal basis and provides sufficient factual information to enable the Washington office to pass judgment on the jurisdictional basis. The regional attorney will concur in the request if he feels the case is legally supportable; but if not, the regional director may still request that a complaint issue, and the regional attorney may dissent from the request. The regional attorney is consulted because he will have to try the case if the complaint issues, and he is the legal advisor to the regional director.

Prior to March 1, 1940, the request was sent to the secretary of the Board; but on that date the Board created a chief administrative examiner, whose responsibility it was to analyze cases and approve or reject requests. In early 1941, as a part of internal reorganization carried on by the Board, there was developed an Authorization Committee. This committee's function is to consider and act upon all requests for authority to issue complaints, all requests for authority to institute investigations pertaining to representation, and all appeals from refusals by regional directors to issue complaints. The committee is composed of the General Counsel or his designee, the Director of the Field Division or his

designee, and the Chief of the Case Clearance Unit of the Litigation Section.

Requests for authority to issue complaints or to institute investigations are routed to the Director of the Field Division, who may approve the request and send it on to the Chief of the Case Clearance Unit for approval. If the Director of the Field Division does not note his approval, the request is still sent to the Case Clearance Unit for analysis before being returned to the Field Division for reconsideration. In any event, the General Counsel is always available for consultation. The case is reviewed in light of the facts as they are silhouetted against the policy of the Board, the treatment accorded similar cases throughout the regional offices, and the facilities available for holding hearings and trying cases. In the course of the review, difficult questions of law may present themselves; hence the evidence is reviewed to determine its strength and to evaluate legal difficulties. In those cases where it appears that an extremely difficult or new type of issue is being presented, the Board is available to review the case and render approval or rejection of the request.<sup>19</sup>

Throughout most of the first five years of the Board, the requests for authority to issue complaints were palpably and unreasonably inadequate in the sense that roughly one half of the requests for authority had to be returned to the regional offices in order that the Washington office would have the proper information upon which to make a determination as to the complaint.<sup>20</sup> When the request was returned, additional investigation by the field examiner may have been necessary; very often the information had been obtained but had not been incorporated in the original request, a shortcoming that rested primarily with the field examiner and the regional director. Sometimes field examiners gave information of a broad character but neglected the detailed type of information upon which the Board desired to authorize

<sup>19</sup> H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, pp. 527-528.

<sup>20</sup> Monograph No. 18, pp. 18-21. Before the creation of the office of the chief administrative examiner, requests for authority to issue complaints were seldom granted in less than a week; and often two and three weeks elapsed. This annoyed the regional directors, who regarded themselves on the "firing line." They could not obtain action, yet the absence of action entailed union wrath. Unions were also annoyed because Washington did not answer their inquiries within a reasonable period. The trouble seemed centered in the secretary's office, where too many functions were carried on.

complaints. Quite often the regional directors cluttered up the Board's machinery by requesting that a complaint issue and a hearing date be set when there was no real desire to hold a hearing. This practice arose from the regional directors' finding that often a complaint and definite hearing date led employers to reach a settlement that they would not reach otherwise. Without proper regard for the burden of the Board's machinery, a complaint would be requested merely on the grounds of using it as a lever to pry a settlement.<sup>21</sup> This type of enforcement detracted from the stature of the administrative agency in view of the delay caused by loading the overburdened machinery with inadequately supported requests. While the Board did not always have to seek additional information from the regional offices, much correspondence was necessary; and cases consequently lagged development.

Some regional directors had fewer requests returned than did others, but at bottom this was a personnel and efficiency problem that might be encountered in any organization. By the middle of 1940, however, the Board had reached a stage of improvement where requests for authorizations were fully considered with more dispatch. Not only was there a considerable emphasis to force the complaint requests to cover only narrow issues and to be completely supported with detailed evidence and information, but also the Board's staff had by then cut through the backlog of old cases. It was inevitable that the Board would require requests for complaints to be well supported. The time, money, and staff were not adequate to permit the issuance of ill-founded complaints, which might lead to a Board dismissal of the case; and a long series of dismissals would not increase compliance with the Act. The appointment of a chief administrative examiner, the organization of an administrative division in charge of regional offices and case development, and the Authorization Committee were successive moves by the Board to speed the approval or rejection of complaint requests. The Board is now endeavoring to improve the regional office performance to a level where regional directors will issue complaints and the Board will receive the case only after the hearing.<sup>22</sup>

<sup>21</sup> Smith Hearings, Vol. I, No. 10, p. 249.

<sup>22</sup> For the fiscal year ended June 30, 1939, of 553 requests for authority to

After the Authorization Committee has reviewed the evidence, it either approves the issuance of a complaint based upon those charges it thinks sustainable at a hearing, or it denies the request. Where there is a denial, the regional director attempts to get the charge withdrawn rather than refuse to issue the complaint. In some cases, however, even after authorization of a complaint has been given to a regional director, it is possible to dispose of the case without the necessity of formal action. In the event a settlement has been reached but a complaint has been authorized though not issued, the approval of the Washington office is necessary before the case may be disposed of by that means.<sup>23</sup> The regional director here attempts to obtain a settlement reduced to writing, and normally he would then prevail upon the union to withdraw the charges. A settlement may be reached, however, without the union's withdrawing the charges; and the case is closed as adjusted. Whether the union does or does not withdraw the charge, the case is not closed until the employer complies and offers proof of his compliance with the settlement. Affirmation of employer compliance must be made by the party bringing the charge.

It may happen that after authorization for the issuance of a complaint is given the field office discovers additional evidence which indicates that the charges forming the basis for the complaint are insufficient to support a hearing. In that event, the regional director secures approval for dismissal of the case.

Upon authorization, the complaint is actually drawn by the

issue complaints, 53 were denied. This led to criticism by the Attorney General's Committee on Administrative Procedure. In essence, the criticism grew out of the maintenance of a centralized control that had its origin in the days when the constitutionality of the Act was questionable and the Board scrutinized each case with care. It was argued that by 1940 the regional directors had ample precedents and they might well issue complaints themselves except when presented with difficult or borderline issues that demand Board consideration. The saving in time would be considerable, and the Board's legal presentation would still be subject to Washington control. The Act authorizes "the Board, or any agent or agency designated by the Board," to issue complaints. See Monograph No. 18, pp. 20-23; Board Press Release R-4073; H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, p. 509.

<sup>23</sup> The former requirement of the secretary's approval engendered the criticism from the director of the New York regional office that more delay was created and that this form of centralization ("bureaucracy") put the regional director in a "lowly" position and undermined public confidence in the regional director as a responsible public official. Smith Hearings, Vol. I, No. 10, p. 350.

regional attorney and is based upon the allegations in the charge and the investigation conducted by the field examiner. The formal complaint is then served upon the alleged violator, either in person or by registered mail. The complaint specifies the charges and in effect states the allegations that the Board is going to attempt to prove. Accompanying the complaint is a copy of the charges brought by the complainant, a copy of the Board's rules and regulations, and notice as to the hearing date and place. The Act provides that the hearing shall be held not less than five days after the serving of said complaint; and this period was incorporated in the Board's rules and regulations until 1939, when the time period was changed to "not less than ten days after the service of the complaint."<sup>24</sup> Since the notice of hearing accompanied the statement as to the place and date of hearing, it was possible that in exceptional cases the respondent would have but five days' notice. The Board deemed this to be wrong in principle, hence the change in the period. Actually, the five days' notice required under the original rules had seldom if ever worked a hardship on any respondent, since the Board always granted requests for extensions of time. Ordinarily the Board never went to hearing within the specified minimum, although the minimum was present if an important case demanded exceptional speed. For the operation of the Board from October 1, 1935, to June 30, 1939, just two weeks prior to the change in the rules, the average number of elapsed days from the complaint to the hearing was fifteen.<sup>25</sup>

The rules and regulations extend to the respondent the right to file within ten days an answer in which he may set forth the facts which are to constitute his defense. The respondent must admit or deny or explain each of the allegations, and under the rules his failure to do so constitutes the allegation a true statement. The exception is when the respondent is without knowledge, in which event he must so state, and the statement operates as a denial. Ample right to amend the answer, through the discretion of the trial examiner, the regional director, or the Board, exists and may

<sup>24</sup> Appendix I, Section 10(b), and N.L.R.B. Rules and Regulations, Series 2, Article II, Section 5.

<sup>25</sup> Board Exhibit No. 45, Smith Hearings, Vol. II, No. 12, p. 445. The figure is the median and high because of adjournments. Seldom was more than ten days' notice given initially. Monograph No. 18, p. 33.

be done even though the complaint has not been amended in any way. The reason for the answer is to permit clarification of the issues involved, and whenever a respondent clearly denies or admits an allegation it is often possible by stipulation to abstract that issue from the hearing; and the Board has made liberal use of stipulations to avoid long, drawn-out testimony.

Unfortunately, for several years the complaint was stated in fairly broad terminology, so that the answer, likewise constituted in broad terms, was tantamount only to a denial and the allegations had to be tried in the hearing. The breadth of the complaints was probably partly responsible for a practice carried on by respondents for some time, especially in 1937.<sup>26</sup> When filing answers, they would often request bills of particulars, apparently because of a catchall provision in the complaint, which would allege that the respondent "by his agents, servants and employees," or "by the above and other acts" had committed certain unfair labor practices.<sup>27</sup> Requests for bills of particulars would then ask that the "other acts" be specified or that the "agents" be named; and the trial examiners, as a matter of Board policy, had to determine whether to meet the request. As a policy, the request would be granted where it did not appear that the objective of the respondent was to ascertain before the hearing the nature of the Board's technique in proving the allegations, an objective which was pursued extensively in at least one region and certainly was not unknown in others.<sup>28</sup> Moreover, the request

<sup>26</sup> During the so-called "Liberty League Era," so designated because of the attitude of the Bar toward the Act and the Board. By 1940 the attitude of members of the Bar was improving. The hostile and irritating manner of opposing attorneys led one regional director to suggest that attorneys be admitted to practice before the Board. The Board's Rules and Regulations (Article II, Section 31) permit it to exclude persons from the hearing by reason of contemptuous conduct; but this has seldom been invoked, only, however, because of the demonstrated tolerance of the Board and trial examiners. In two instances the Board began disbarment proceedings against certain counsel for unprofessional conduct but dropped the proceedings when apologies were forthcoming. Monograph No. 18, p. 39.

<sup>27</sup> Monograph No. 18, p. 25. Regional attorneys often filed motions to amend the complaint during the hearing. Said the Attorney General's Committee:

"... The filing of imperfect complaints is unquestionably one of the factors which has militated against the Board's acquiring a reputation for orderly and expeditious procedure." Monograph No. 18, p. 26.

<sup>28</sup> The busy New York region. Smith Hearings, Vol. I, No. 10, p. 343. The regional director described the practice of request for bills of particulars as "a curse—a rash—."

often came at the time of the scheduled hearing, so that it was necessary to adjourn.<sup>29</sup> While there were no doubt cases where a bill of particulars was justified, on the whole the Board was met with procedure which was essentially dilatory; and the breadth of the Board's complaint did not discourage such a tactic. Any realism regarding the procedure thus far related shows that the respondent would know with what he was charged through the copy of the charge he received, plus the conference in which he engaged with the regional director, plus a fairly detailed statement in a long complaint. Moreover, the Board and the regional directors have striven to make the complaints more specific and detailed in an attempt to reduce the requests for bills of particulars. This, plus the Bar's change of attitude toward the Act and its administration, have been somewhat successful.

Despite the Board's rules specifying that the failure of the respondent to deny an allegation shall constitute an admission of guilt, the Board proceeds in the hearing to adduce evidence to support its undenied allegations. The reason for this procedure is the cautiousness with which the Board approaches its task, for the order which is to follow a finding is to be based "upon all the testimony taken";<sup>30</sup> hence the Board adduces evidence or uses admitted facts as the basis for all orders it issues. Whether a reviewing court would or would not permit a respondent to object to an order based upon a failure to deny would probably turn upon whether the court would regard the respondent as fully on notice as to the Board's procedure.<sup>31</sup> But important here is this evidence of the thoroughness with which the Board avoids legal pitfalls.

Section 10(b) of the Act provides that the party, which means the employer, charged with violation of the Act shall be notified as to the hearing; but the Board's regulations provide for addi-

<sup>29</sup> The request for an adjournment was often used as a delay tactic. It became so prevalent in the Cincinnati region that the regional director set "phoney dates" for the hearing in order to conserve the use of trial examiners, and he recommended that the practice be extended. The regional director, when issuing the complaint, would set a date and advise the chief trial examiner that the date was "phoney" so a trial examiner would not uselessly be sent to conduct a hearing. Smith Hearings, Vol. I, No. 10, pp. 248-249.

<sup>30</sup> Appendix I, Section 10(c).

<sup>31</sup> Monograph No. 18, p. 28.

tional notification to: (1) the person or labor organization making the charge; (2) any labor organization referred to when there are allegations of company domination of a labor organization; and (3) any labor organization, not the subject of a company-domination allegation in the complaint, which is a party to any contract with the respondent, the legality of which is put in issue by any allegation of the complaint.<sup>32</sup> The Board's procedure on notice appears to have gone through three well-defined stages.

(1) The Board has always given notice to the respondent and to the person or organization bringing the charge. This still continues. Prior to February 28, 1938, the Board did not give notice to an organization charged with being employer-dominated; but on that date the Supreme Court reviewed the lower court's ruling in the *Pacific Greyhound* case.<sup>33</sup> One of the issues there involved was whether a company-dominated union had to be given notice. An affiliate of the AF of L had brought charges of interference, restraint, and coercion, and company domination. The Board did not give the "Association" (company union) notice, to which the lower court said that the

" . . . Board was without authority to order the employers to withhold recognition from the Association, without notice to it and opportunity for a hearing, and without an election by the employees to choose a labor organization to represent them." <sup>34</sup>

The Supreme Court, however, held:

"As the order did not run against the Association it is not entitled to notice and hearing. Its presence was not necessary in order to enable the Board to determine whether respondents had violated the statute or to make an appropriate order against them." <sup>35</sup>

(2) Despite the court's holding in the *Greyhound* case, within a short time the Board modified its practice and consistently thereafter served the alleged company-dominated union with a copy of the complaint and a notice of hearing. Thus, the organi-

<sup>32</sup> N.L.R.B. Rules and Regulations, Series 2, Article II, Section 5. In the third category, *supra*, the organization having a contract is made a party.

<sup>33</sup> N.L.R.B. v. Pennsylvania Greyhound Lines, Inc., et al., 303 U. S. 261 (1938).

<sup>34</sup> N.L.R.B. v. Pennsylvania Greyhound Lines, Inc., et al., 91 F. (2d) 178, CCA-3.

<sup>35</sup> N.L.R.B. v. Pennsylvania Greyhound Lines, et al., 303 U. S. 261 (1938).

zation has knowledge of the proceedings, and it may intervene if its interests appear to be endangered or if it cares to resist the imputation of being dominated by the employer.<sup>36</sup>

On December 5, 1938, the *Consolidated Edison* decision was handed down by the Supreme Court.<sup>37</sup> Here, as related to notice, the issue was whether the Board was required to give notice to the affiliate of a national organization when that affiliate had a contract with the respondent who was charged with violating the Act. The Board had always taken the position that all parties possessing a substantial interest in a case should be permitted to intervene to the extent of their interest, and this was modified only in the case of the company-dominated union. From its inception, the Board had given notice to unions whose contract might be invalidated by the Board order. The *Consolidated Edison* case involved a situation where the Board attempted to give notice but committed the error of serving the wrong local of the national organization, thereby failing to satisfy the demands of procedural due process. The Court held that, where a contract was involved, the Board should give notice; and the Court refused to enforce the Board's order setting aside the contracts' involved.<sup>38</sup> With regard to the *Greyhound* case as a Board defense, the Court said:

"That case, however, is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of Section 8(2). The statement that the 'Association' so formed and controlled was not entitled to notice and hearing was made in that re-

<sup>36</sup> The Board's policy has always been liberal. Prior to the hearing, intervention is controlled by the regional director, and is under the trial examiner after the hearing has begun. Article II, Section 19, of the rules permits any person or organization to intervene if an interest can be shown, though intervention for an alleged company-dominated union is restricted to the issues to which it is related, that is, domination or interference. The petition of a labor organization to intervene is denied where it has been found, in a prior proceeding, to be company-dominated. The liberality of the Board in permitting allegedly dominated organizations to become parties led the Attorney General's Committee on Administrative Procedure to suggest that all such organizations be made parties in the first instance and thereby avoid the "red tape" of a technical motion to intervene. Monograph No. 18, pp. 29-30.

<sup>37</sup> *Consolidated Edison Co. v. N.L.R.B.*, 305 U. S. 197 (1938).

<sup>38</sup> *Ibid.*, Monograph No. 18, pp. 28-29. S. Hearings on N.L.R.A., Part 3, pp. 577-558.

lation. . . . It has no application to independent labor unions such as those now before us."<sup>39</sup>

This quotation apparently makes the distinction between the *Greyhound* case and the *Consolidated Edison* case turn on the difference between an independent, or nationally affiliated organization, and one which has been found to be company-dominated. But such a distinction seems unreal. The Board never brings a charge of company domination with reference to the affiliate of a national organization, but rather a charge of interference is used simply because the national labor organizations would not tolerate the charge of being company-dominated. But more, the Supreme Court's basis for distinguishing the cases presents real difficulties in logic: Since under the *Consolidated Edison* and *Greyhound* holdings there would be no requirement to give notice where there was a Board finding of company domination, the Board would be released from the notice requirement only after the hearing and a finding; yet it would be pointless to have a finding as the basis for the issuance of a notice for a hearing that supposedly precedes the finding. Or, to describe differently what appears to be an insoluble contradiction, it may be said: The union whose contract is threatened by proceedings under the Act must be joined as a party in order to fulfill notice requirements with certainty, providing the union is not company-dominated;<sup>40</sup> the union need not be so joined if it is company-dominated, but that can not be known until after the proceeding, and then it is too late to know whether proper notice has been given.

In a later case, the Board drew a fine distinction between the Court's holdings: The *Greyhound* case, argued the Board, applies where a contract between a labor organization and an employer is itself an unfair labor practice, such as a closed-shop contract with a minority union; but the *Consolidated Edison* ruling applies where organizations are parties to contracts which are annulled.<sup>41</sup>

<sup>39</sup> *Consolidated Edison Co. v. N.L.R.B.*, 305 U. S. 197 (1938).

<sup>40</sup> To the Board, the *Consolidated Edison* holding appeared to say that a contract could not be invalidated until the union had been heard. This idea was changed by the holding in the *National Licorice Co.*, *infra*.

<sup>41</sup> See the *Supplemental Memorandum for the N.L.R.B. in the U. S. Circuit*

Following the ruling in the *Consolidated Edison* case, the Board modified its procedure not only by giving notice to any organization not company-dominated whose contracts were endangered by the proceedings, but also by making the organization a *party* to the proceedings.<sup>42</sup> This modification was made January 17, 1939, and was later incorporated in the rules revision of July, 1939, so that due process since the beginning of 1939 has been as follows: When there is a charge of company domination, the Board serves the alleged company union with a copy of the complaint and notice of hearing; and because the *Greyhound* ruling does not require this, due process is more than served and protected. When a charge of company domination is not involved but the proceeding may bring an order which will affect the contractual status of an independent organization, that organization is made a *party* to the proceeding; and this, too, goes beyond the due process requirements as required by the *Consolidated Edison* case.<sup>43</sup> The complainant likewise automatically becomes a party to the proceeding.

(3) In order to satisfy due process requirements, the general rules on service would seem to include all parties whose interests might be adversely affected. The employer, of course, is interested, since orders run against him; but other parties would acquire an interest only when the Board's order required the employer to take action which would indirectly affect them, and even then there would be risk in generalizations rather than in particular cases. Even if a party is indirectly affected, there is the question as to whether the effect is such as to require notice and a copy of the complaint to be served. For example, the non-union man would be affected by an order requiring the employer to bargain with a union. An order which required the reinstatement of employees would affect those hired in the interim to fill the places of the reinstated employees. The Board has taken the position that such examples do not constitute those affected as

*Court of Appeals for the Ninth Circuit, N.L.R.B. v. Cowell Portland Cement Co., 1939.* However valid the Board may have thought its distinction, such a Board approach did not put the Court in the position of overruling itself.

<sup>42</sup> Notice quite often goes to the central labor union.

<sup>43</sup> To make an independent organization a party may be said to exceed due process requirements under the holding in *National Licorice Co. v. N.L.R.B.*, 60 S. Ct. 569 (1940). See *infra*.

possessing an "interest" and that the only practical, workable criterion of an "interest" such as to make a person an indispensable party is of such a character that to deny the right of participation would constitute a denial of due process.<sup>44</sup>

This definition was given meaning in the *National Licorice Co.* case, where the "Balleisen contract" was involved.<sup>45</sup> That contract, which the Board has always held to be in violation of the Act, is implemented through a "shop committee" of some sort and is between the employer and "each and everyone of the employees,"<sup>46</sup> with the committee in no sense a bargaining agent. The Board had ordered the employer to cease giving effect to the contracts and to inform the employees that such contracts constituted a violation of the Act. The employer challenged ". . . the authority of the Board because of the absence of the individual employees, as parties, to make any order respecting the contracts."<sup>47</sup> The Court said:

"As the National Labor Relations Act contemplates no more than the protection of the public rights which it creates and defines, and as the Board's order is directed solely to the employer and is ineffective to determine any private rights of the employees and leaves them free to assert such legal rights as they may have acquired under their contracts, in any appropriate tribunal, we think they are not indispensable parties for purposes of the Board's order and the statute does not require their presence to the present proceeding and there was no abuse of the Board's discretion in its failure to make them parties."<sup>48</sup>

Any other holding by the Court would have rendered Board administration a practical impossibility. To have hundreds of parties to a proceeding would be unthinkable. Moreover, this holding by the Court aided the Board through clarification of the *Consolidated Edison* case.<sup>49</sup> Despite the *National Licorice Co.* decision, the Board still exceeds the due process requirements both as to notice and as to persons and organizations as parties; and if one excludes the inadvertent error in the *Consolidated Edi-*

<sup>44</sup> S. Hearings on N.L.R.A., Part 3, p. 557.

<sup>45</sup> *National Licorice Co. v. N.L.R.B.*, 60 S. Ct. 569 (1940).

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> Monograph No. 18, pp. 29-30.

son case, there is no court reversal of the Board because of failure to give notice to, or permit intervention by, an interested party.<sup>50</sup>

While the Board practice on notice and parties is impressive with regard to due process, the very cautiousness which is there desirable raises a question as to the efficacy of the practice when one considers the broader effects. If the Act is regarded as the legislative basis for the implementation of broad social policy and if the benefits accruing to individuals in any given proceeding are incidental, then it is arguable that the Board ought to take a different attitude toward who should be constituted parties. The Board itself did regard ". . . the act as not conferring a private right of action upon the person or labor organization making the charge, but as placing upon the Board the responsibility for enforcing the public policy which the act embodies. . . ."<sup>51</sup> This followed the spirit of the House Committee on Labor when, in reporting the bill, it said:

" . . . No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint. The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal."<sup>52</sup>

The Supreme Court regarded the Act primarily as the implementation of public policy when it said in the *National Licorice Co.* case:

"The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. . . . It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce. . . ."

"In a proceeding so narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the tradi-

<sup>50</sup> S. Hearings on N.L.R.A., Part 3, p. 558.

<sup>51</sup> First Annual Report, N.L.R.B., p. 23.

<sup>52</sup> H. Report No. 1147 on S. 1958, 74th Congress, 1st Session, p. 24.

tional rules governing the joinder of parties in litigation determining private rights. . . ." <sup>53</sup>

The policy of the Board whereby a complainant becomes a party, then, does not appear legally necessary. The hearings are often characterized by re-examination and re-cross-examination of witnesses by counsel for the parties, and one result often is annoyance and irritation of the respondent. True, the complainant has a real interest; but the regional or other Board attorney presenting the case for the Board functions to establish on the record the truth of the charges in the complaint, so that active complainant participation at this stage does not seem necessary.<sup>54</sup> Not only is the hearing pace slower, but such participation contributes the wrong idea to public enlightenment as to the Board's function. It is to be expected that in a proceeding between an employer and the Federal government that the employer would appear with counsel; but the appearance in the same case of counsel for a labor organization leaves with the public the idea that the agency is prosecuting the employer *for* the union, which idea conjures up other ideas of one-sidedness, unfairness, wrong public policy, bias, prejudice, and the whole gamut of similar terms which have been the stock-in-trade of opponents of the Act and the Board. There may be some truth in the idea that the Board is trying the case *for* the union, but the broader implications of the Act prevent such a conclusion as the important one. Unfortunately, the public and employers lose sight of the broader implications under the stress of courtroom procedure. Public relations and the administrative process might then suggest that the Board change its practice with respect to making the complainant a party in order that the Board render all possible appearance of implementing *public policy*.

<sup>53</sup> *National Licorice Co. v. N.L.R.B.*, 60 S. Ct. 569 (1940).

<sup>54</sup> The Attorney General's Committee on Administrative Procedure takes the position that there is considerable doubt if the complainant should be made a party in any cases not at the "trial stage," although the complainant would still be permitted to file exceptions to the intermediate report. The Committee pointed out that the F.T.C., under somewhat analogous circumstances, refused "to permit intervention by those who wish to support the complaints issued by it, and has not regarded as parties those who initiated its action by filing charges against the respondent. In order to reduce expenditure of time, to eliminate a frequent source of added friction, and to retain control over its own trial hearings, the Board should follow the lead of its older colleague, upon whose procedure its own is so closely patterned." Monograph No. 18, pp. 30-32.

There is another angle to the question of proper public relations. Unions and their members feel that their status is being protected when their attorney is on the scene "protecting" their interests, as indeed it is. Often the leadership of a labor organization has a struggle to maintain not only its position but the organization itself as a going concern. When the leader can point out to the workers that the union's attorney is watching every move, he has an effective and important organizing weapon. To remove the complaining union as a party would, therefore, engender the ill will of union leaders and also, to some extent, the ill will of the rank and file. In light of the nature of the Act, this narrower public-relations problem can not be ignored; yet as between wooing the public and employers, or the unions, perhaps the former would be the better alternative. The considerations attached to an expedited hearing that would result from fewer parties add force to such an alternative.

The Act specifies that the Board shall have power to issue a complaint "whenever it is charged that any person has engaged in or is engaging in any unfair labor practice . . .," and the complaint must state the charges in that respect.<sup>55</sup> The question is then presented as to amending the complaint, since often the investigation reveals unfair labor practices that the charge has not covered. Since the complaint is supposed to state the charge and since the Board's caution not to violate procedural due process restrictions is thorough, whenever the Board finds violations of the Act during the investigation it has the charge amended to provide the proper foundation for all violations alleged in the complaint. Thus is avoided any possibility of reversal based on the proposition that the jurisdiction of the complaint shall extend only to those practices alleged in the charges under the terms of the act.<sup>56</sup> This painstaking maneuver, while again demonstrating the legal thoroughness, was unnecessary under the ruling by the Supreme Court in the *National Licorice* case. There the employer contended that the charge was a "jurisdictional prerequisite to the complaint and the subsequent proceedings, and that they [the proceedings] are restricted to the specific unfair labor practices alleged in the charge. . . ." But the Court said:

<sup>55</sup> Appendix I, Section 10(b).

<sup>56</sup> Monograph No. 18, p. 24.

"It is unnecessary for us to consider now how far the statutory requirement of a charge as a condition precedent to a complaint excludes from the subsequent proceedings matters existing when the charge was filed, but not included in it. Whatever restrictions the requirements of a charge may be thought to place upon subsequent proceedings by the Board, we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board. The violations alleged in the complaint were but a prolongation of the attempt to form the company union and to secure the contracts alleged in the charge. All are of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects. The Board's jurisdiction having been invoked to deal with the first steps, it had authority to deal with those which followed as a consequence of those already taken. . . ." <sup>57</sup>

As a practice at the close of a hearing, the Board uniformly moves that the pleadings be conformed to the proof; but this is to cover minor inaccuracies which might have existed in the complaint and is not in lieu of an amended complaint to cover violations litigated but not offered in the complaint. This again may be an example of legal thoroughness since the Federal Rules of Civil Procedure would probably support a motion to conform the pleadings to substantial matters litigated.<sup>58</sup> Substantial amendments bring a continuance if the original complaint is extensively altered; but an amendment to the complaint which adds only, for example, the name of another employee discriminated against does not halt the hearing.<sup>59</sup> Some amendments, while not requiring that the hearing be halted, have no proof adduced until

<sup>57</sup> *National Licorice Co. v. N.L.R.B.*, 60 S. Ct. 569 (1940).

<sup>58</sup> Rule 15(b) of the Federal Rules of Civil Procedure provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Monograph No. 18, p. 26.

<sup>59</sup> In an attempt to reach an agreeable date, unions are sometimes consulted when a continuance is requested. This is not necessary, but again it is to serve public relations. Granted that unions are justly critical of delay, still again there is here the appearance of the Board's agents prosecuting for the union in a hearing that is essentially between the employer and the Government. Continuances are a matter of discretion with the regional director, trial examiner, and Board, depending upon the stage of the proceeding.

the parties have had opportunity to prepare.<sup>60</sup> The amendments to the complaint may be made by the regional director prior to the hearing; by the trial examiner during the hearing and until the case has been transferred to the Board; and thereafter, prior to the issuance of an order, by the Board itself.

Once the Authorization Committee has authorized the regional director to issue a complaint, a hearing date is still to be set; and this is a matter of consultation between the Authorization Committee and the chief trial examiner. Prior to December 1, 1939, regional attorneys had demonstrated an inability to narrow the issues to be tried and at the same time to adduce for the record the testimony needed to sustain the charges without cluttering the record with a mass of irrelevant material. Attorneys trying the case for the Board were supposed to interview all witnesses who were to testify and were supposed to prepare a brief for the trial. Because the records left so much to be desired, the Board created a specialized group within the litigation section, which group's permission was required before the chief trial examiner issued a hearing date. Such permission was given only after the group had reviewed and passed upon the case, in order to narrow issues and to eliminate irrelevant evidence or allegations likely to fall in the hearing. Nor did the work of the specialized group then end: focus was next turned on the trial attorney; the case was followed closely; suggestions were made as to the presentation of the case, the issues, the evidence, the progress of the case, and, in short, all matters that would improve the record and shorten the hearing. The impressive success of this machinery was seen within a few months through shorter records on the average, faster flow of cases, better use of trial examiners, and a lesser burden upon the review section.

Following internal reorganization of early 1941, the analysis of cases where a complaint is to issue is made by the chief of the Case Clearance Unit of the litigation section, who, with the Director of the Field Division and General Counsel, compose the Authorization Committee.<sup>61</sup>

<sup>60</sup> If a substantial amendment is involved, the employer receives a copy of the amended complaint and legal notice.

<sup>61</sup> H. Hearings, F.S.A., Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, pp. 509, 527.

## Chapter XIV. COMPLAINT CASES (*Continued*)

### A. The Hearing

The place of the hearing is always the Board's offices or other Government locations within the immediate locality where the violations are alleged to have occurred. This is to preserve the appearance of impartiality and at the same time not inconvenience the parties to the proceedings. In some instances, the Board has exercised its right under the Rules and Regulations to transfer a hearing from one region to another.

The hearing itself is in most respects very similar to a purely judicial trial. Indeed, it is often spoken of by various members of the Board's personnel as a trial proceeding, and the Board's attorney usually "prepares the case for trial." The attorney for the Board is not, according to the instructions he receives, supposed to view himself as a "prosecuting attorney," but rather he is to envisage his task to be the development of the facts in such fashion that when placed in the record they will constitute "a complete and legally impregnable record that will pass the scrutiny of the court."<sup>1</sup> While the Board had some experience with overzealous attorneys who believed their sole task was to win the case, at least before the trial examiner, it has not tolerated other than an orderly presentation of evidence by its own attorneys. The Board insists that its trial attorneys must carefully prepare their cases and be familiar with all evidence, even that which may disprove the Board's case.<sup>2</sup> The close attention to detail and the objective of establishing facts do not, despite the Board's warning, erase all the traces of the "prosecuting attorney" from the Board's trial attorney. Clearly, he is attempting to perform for the body politic a function similar to that performed by the prosecuting attor-

<sup>1</sup> Monograph No. 18, p. 30.

<sup>2</sup> The attorney cooperates with counsel for the complainant prior to, and during, the trial.

ney. Not only the regional attorney but the representatives of the Board in the regional office, who have interviewed the parties and witnesses, believe the allegations of the complaint. Through its Washington personnel authorizing the issuance of the complaint, the Board thinks the allegations are *probably* true because of the general confidence of the Board in the judgment of the regional personnel. The hearing is to establish by public examination and cross-examination the truth or falsity of the allegations, as well as to develop a record which will be legally sound; and such hearing has in many cases failed to materialize in fact the probability created by the allegation.

The employer is always represented by counsel at the hearing. The respondent's counsel carries out the "trial aspects" of the formal proceeding by introducing defense evidence to disprove the allegations and by cross-examining the witnesses of the Board's attorney. Not only the respondent but also any intervening parties, which ordinarily are other unions, have representation at the hearing; and each intervenor's position is presented.

The trial examiner is delegated to a case by the chief trial examiner a short time before the hearing date. The panel of trial examiners consists of full-time and regular employees, although the Board made use of per diem trial examiners in the past. During the early years of the Board's existence, when important issues were being resolved and important cases were being tried, Board members themselves went on circuit and heard some ten cases.<sup>3</sup> When, however, the burden began to press, it was no longer feasible for the members to hear cases, since they had to devote their full energies to the rendering of decisions and the care of their administrative duties.

In delegating the trial examiner to a case, the chief trial examiner gives attention not only to his calendar but also to the type of case and the type of trial examiner he has and will have available. Constant variations from calendar plans are necessary because of the inability to predict how the hearings will themselves proceed and how long they will take; and the burden has

<sup>3</sup> In Detroit, Pittsburgh, and Cincinnati. All Board members heard the *Fruehauf* case, and the *Jones and Laughlin* case was heard in part by the entire Board and in part by Chairman Madden. These two cases were among the well-known five decided by the Supreme Court on April 12, 1937.

always been so heavy that, as a matter of retaining flexibility and making full use of the staff, the chief trial examiner has never been able to delegate men to a hearing far in advance. Even if staff demands permitted the delegation of trial examiners well in advance, there would still be a hesitancy to make their identity known prior to the hearing. The Board desires to maintain functional distinctions, and to facilitate this the regional office and the parties are not informed as to the trial examiner's identity. When a trial examiner enters a case, he has received and presumably read the complaint, the charge, and the answer, and no more; and his contact with members of the regional office, which would provide insight on the merits of the case, is discouraged. It is wrong to suppose that no contact exists between the trial examiner and the regional office once the trial examiner has arrived for a hearing. Indeed, the approach of the chief trial examiner is that the trial examiners are adults, and they are simply informed that fraternizing with Board attorneys is not permitted. The trial examiner must call at the regional office for his mail and must be in touch with the office so that he can be reached from Washington.<sup>4</sup> It follows that the trial examiners become acquainted with the regional staff people; and the trial examiners constitute a source of information on latest developments in Washington, especially in those regional offices farthest removed from the Board, the Congress, and the labor organizations' national headquarters.

It sometimes occurs that the trial examiner, after reading the complaint and answer, is unable to familiarize himself with the pleadings as he is supposed to do before the hearing begins. In that event he is instructed to have a conference with the counsel for the parties, but he is warned not to have any conferences with the Board attorney alone. Often during such conferences and through similar ones during the hearing, procedural matters are discussed by the parties' counsel and the trial examiner; and a settlement often evolves from such conferences. This is similar

<sup>4</sup> When the staff was still "young," the regional directors and trial examiners sometimes consulted before the hearing began, or during the hearing. In the *Cincinnati Milling* case, so as to assure due process and a fair hearing, the Board vacated its order and ordered a new hearing because the trial examiner and regional director consulted before and during the hearing. *Smith Hearings*, Vol. I, No. 8, pp. 277-278. Trouble is no longer encountered on this score.

to the action of a judge who, when hearing a suit, attempts first to reach a settlement with the parties and thereby conserve the resources of the state.

Once a hearing is under way, the trial examiner is no cloistered moderator, although he must be fair and impartial toward all parties and counsel. But, on the one hand, the trial examiner may if he wishes consult with his superior; and, on the other hand, the trial examiner has a definite responsibility to get the facts into the record. While both of these relationships represent departures from such characteristics as surround a purely judicial officer such as the judge,<sup>5</sup> neither precludes judicious manner and proper control so that the hearing goes forward in an orderly manner designed to command the respect of all parties. The trial examiner is under instructions to confer with the chief trial examiner in Washington whenever questions arise, the answers to which are in doubt. Even if no questions arise, in order to expedite the hearings the chief trial examiner follows the trial examiner through weekly reports or daily contacts. This has engendered criticism that the trial examiner has no opportunity to be an independent moderator because he is constantly influenced in his conduct of the hearing.<sup>6</sup>

After opening informational remarks by the trial examiner as to procedure on corrections of the record, exceptions, motions, and other such matters, the trial examiner assumes the role of a trial referee. As such, he performs certain judicial functions, such as to decide on the relevancy and irrelevancy of evidence, to rule on motions, and, broadly, to moderate the trial. Because he performs these functions of a purely judicial nature, critics of the Board have decried departures from these functions; and there is centered in the trial examiner and his functions the shibboleth of

<sup>5</sup> In a judge-and-jury trial the jury determines the set of facts, and the judge states the law that is applicable to possible factual situations.

<sup>6</sup> Examination of numerous telegrams sent and received by the office of the Chief Trial Examiner reveals an almost complete dependence by the trial examiners upon the instructions of the head of this Division, even as to the most minute points of substantive law and evidence.

"The conclusion is inescapable that either the trial examiners have been considered entirely inadequate to perform the simplest functions of their office or there has been unwarranted intervention of the administrative into the judicial function by the office of the Chief Trial Examiner, acting as a super-review authority."

Report on the Investigation of the N.L.R.B., Intermediate Report of the Special Committee, 76th Congress, 1st Session, H. Report No. 1902, p. 44.

"prosecutor, judge, and jury." In a sense, the trial examiner does perform three categorically different functions. In addition to the judicial functions noted, the trial examiner functions actively as does a prosecutor or a defender when he calls for witnesses, or documents, or evidence. He functions as a jury when he actively determines facts. And when, through the intermediate report, he decides how the evidence appealed to him when he weighs it and makes recommendations to the Board as to how the employer may conform with the law, he functions again as a judge. This mixture of functions is deliberate on the part of the Board, and the Rules and Regulations make it the "duty of the Trial Examiner to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice. . . ."<sup>7</sup>

Whereas a jury and trial examiner may both function to ascertain the facts, the trial examiner's responsibility is active participation in order fully to explore the case. The instructions to the trial examiner direct that ". . . An impartial attitude will not prevent the Trial Examiner from vigorously questioning witnesses during a hearing, for he is under a duty to get into the record all the facts in the case, even at the cost of seeming to engage in cross-examination. . . ."<sup>8</sup> Likewise, he ". . . must be ever alert to see to it that all relevant sources of material are fully explored. This does not mean that he should interrupt counsel in their presentation of evidence, but rather that he should not permit the record to be closed until he has fully satisfied himself that all relevant, competent, available evidence has been produced, either by the parties or, if necessary, by the Trial Examiner."<sup>9</sup>

<sup>7</sup> Series 2, Article II, Section 24.

<sup>8</sup> Smith Hearings, Vol. II, No. 1, p. 9.

<sup>9</sup> Monograph No. 18, p. 38, Footnote No. 74.

In *Montgomery Ward & Co., Inc., v. N.L.R.B.*, 103 F. (2d) 147, CCA-8, the court discussed the freedom of the trial examiner to question witnesses and to elicit or clarify testimony but held that "he should do so as an impartial participant and not as an advocate endeavoring to establish one side or the other of the controversy before him.

"This record is full of instances of hostile and searching examination of witnesses . . . The extreme activity of the examiner in questioning of witnesses is quite evident—there is not much hazard in estimating that probably one-half of the pages of this record confined to testimony would show some questions by the examiner. Counsel for the Board seems to have been proficient and this exaggerated participation by the examiner is not commendable—it is likely to, as it did here, shade into partisan activity . . ." (Continued on p. 258.)

The trial examiners follow the instructions and often do participate actively in developing the record, and the chief trial examiner approves a prod by the trial examiner to encourage the Board's attorney to develop the case fully. The duty to develop the case has, on rare occasions, extended into the area where courts are likely to find a denial of due process. Two cases only, as of June 1, 1940, may be cited where the courts found the action of the trial examiner prejudicial. In the first case, *Montgomery Ward & Co., Inc., v. N.L.R.B.*, the court said fairness was denied and was manifested ". . . by omissions from the record of occurrences at the hearing; by unfairly restricting examination and cross-examination by counsel for the company and intervener; by a hostile attitude toward witnesses (whether called by the Board or not) who might be supposed to favor the company or intervener; and by an obvious attitude of bias in other instances."<sup>10</sup> The other case where bias and prejudice contra-

But in *Cupples Company Manufacturers v. N.L.R.B.*, 106 F. (2d) 100, CCA-8, when the respondent contended that participation by the trial examiner amounted to a violation of due process, the court said:

"The petitioner claims that it did not receive a full and fair hearing. . . . We agree with the petitioner's contention that the Trial Examiner exceeded all reasonable bounds in examining—or, rather, cross-examining—the witnesses of the petitioner. The Board was represented by competent counsel, who was in need of no assistance in presenting the Board's case. . . . This incident of the hearing illustrates the truth of the statement of Judge Stone in the case of *Montgomery Ward & Co. v. N.L.R.B.* . . . The conduct of the Trial Examiner in this case, however, differed greatly in degree, if not in kind, from that considered by this court in the case just referred to. . . . Here the Trial Examiner was courteous, and there is nothing to indicate that his examination of the petitioner's witnesses was seriously objectionable to the petitioner. . . . If a Trial Examiner will only keep in mind that the proper exercise of his functions requires open-mindedness, fairness and impartiality, and if he will, within reasonable limits, permit each of the parties to the proceeding before him to prove his own case, in his own way, by his own counsel, he will save himself from criticism and avoid furnishing any basis for a charge that the hearing was unfair and that bias was shown.

"Although we think that the conduct of the hearing by the Trial Examiner is justly subject to criticism, we do not think that it was so unfair as to constitute a denial of due process."

<sup>10</sup> 103 F. (2d) 147, CCA-8. It is said that the parties, upon going to the circuit court with a typed record, agreed to exclude large portions by the use of asterisks. The court did not fully understand this and interpreted the asterisks as connoting "off the record" proceedings by the trial examiner.

While reversing the Board, the court also said:

"In other instances . . . before this court, the examiners have evinced an understanding of the grave responsibilities of their position and duties. They have endeavored to meet those responsibilities and accord fair hearings. It is unfortunate that there should be exceptions. This is one such."

The case was the first one tried by the trial examiner involved.

vened the requirements of due process was the *Inland Steel* case where, after pointing to extensive proceedings "off the record," subpoena requirements deemed unjust, and the hostile manner of the trial examiner, the court cited the *Montgomery Ward* case and remanded the case to the Board for hearing anew.<sup>11</sup> This was done despite the fact that the Board, realizing that the trial examiner was not performing properly, transferred the case to itself before the hearing was finished and relied for its decision upon no intermediate report, which might have reflected the trial examiner's deficiencies.

There have been other cases where, prior to the decision, the Board has itself discovered prejudicial rulings by the trial examiner; and it always has taken steps to correct the errors. In the *Bercut-Richards* case<sup>12</sup> the trial examiner developed testimony and then denied counsel the right of examination, and this led to a new hearing order by the Board. In the *Mount Vernon Car* case<sup>13</sup> the trial examiner exhibited an hostile attitude toward William Green. An AF of L affiliate was involved, and without an intermediate report the Board transferred the case to itself. In the *Express Publishing Co.* case<sup>14</sup> the trial examiner passed remarks upon the editorials appearing in the respondent's newspapers, and the Board ordered a rehearing before another trial examiner. The record of the *Owens-Illinois Glass Co.* case<sup>15</sup> was set aside because the trial examiner denied an offer of relevant evidence by the respondent. In the *West Texas Utilities Co.* case<sup>16</sup> the trial examiner and counsel for the complaining union entered into a serious altercation, which led the Board to order a new hearing in the case.

The negligible number of cases where the trial examiners have failed to render a fair hearing are partially balanced by encomia which have appeared on case records and which have been received by the Board.<sup>17</sup> In many cases parties have complained to the courts of a failure by the trial examiner to render a fair hearing, and the pleadings have failed under scrutiny of the judiciary.

<sup>11</sup> *Inland Steel Co. v. N.L.R.B.*, 109 F. (2d) 9, CCA-7.

<sup>12</sup> 13 N.L.R.B. No. 14.

<sup>13</sup> 11 N.L.R.B. No. 46.

<sup>14</sup> 8 N.L.R.B. 162.

<sup>15</sup> 11 N.L.R.B. 162.

<sup>16</sup> No. C-847.

<sup>17</sup> Smith Hearings, Vol. II, No. 2, p. 64.

Considering the antagonism often facing the trial examiner by counsel for parties and the frequent failures of the members of the Bar to conduct themselves in accord with the better traditions of the profession, the record is indeed presentable.

The "prosecutor, judge, and jury" criticism, as emanating from the activities of the trial examiner, probably is neither valid nor invalid. Rather, it is largely a result flowing from two distinct attitudes toward the trial examiner's function in the administrative process. The maintenance of contact between the Washington office and the trial examiner during a hearing and the participation in an active fashion by the trial examiner in the elicitation and elucidation of facts for the record, reflect the idea that the trial examiner is not to be thought of as a judicial officer only; in part he so functions, but more, he carries on other functions. It is this combination of functions which distinguishes the trial examiner from a judge only, and those who take this attitude toward the trial examiner contemplate his role to be the functional one of operating as an appendage of the Board itself for what is essentially an investigation, not a trial. The other attitude toward the character of the trial examiner is that which regards him and his role as exactly comparable to that of a judge, an attitude which obviously supports a conclusion that the trial examiner should not participate actively in ascertaining the facts and incorporating them in the record lest he endanger his role of dispensing justice as an initial court. The broader issue is the nature of the administrative process. If the Board functions as an appendage of the legislature to ascertain departures from public policy, then there is no reason why the Board and its agents should not be concerned immediately with all stages of a case; but if there is a belief that the process can be broken down and separated into neat categories or stages where different functions are performed, then the comparison of the trial examiner and the judge holds. As the administrative process has matured, the former idea would seem to be theoretically correct; and it is only a failure to understand that process or a deliberate attempt to misrepresent the nature of the process in the public mind, which supports the latter idea.

A mid-position has been taken by Dean Garrison of the University of Wisconsin Law School. He has recognized the character of the administrative process but reasons:

"The Trial Examiner in many ways is the most important person in the administrative process. It is he who hears the witnesses, who must determine their credibility and the weight to be given their testimony. It is upon his report and analysis of the testimony that the Commission or Board will be largely guided in reaching its own ultimate findings of fact, and moreover, his demeanor in the hearing, his courtesy, his fairness, his firmness, his justice and wisdom and common sense in ruling on matters of evidence—upon all these factors will depend very largely the judgment which the parties litigant may have with respect to the worth of that particular agency.

"Now I think that if Trial Examiners were to be independently appointed by some agency other than the agency upon whose cases they sit, and if more seasoned and capable men could be attracted into the business of serving as Trial Examiners, make it a career and a dignified career, there would be a very considerable improvement in the whole administrative system. Such a method of appointing Trial Examiners I think should extend generally throughout the administrative system."<sup>18</sup>

To support the Garrison idea, there are the following favorable points: the "prosecutor-judge-jury" idea might be abolished; smaller agencies not now able to afford trial examiners might be able to do so; better talent might be attracted through the offer of tenure, higher pay, and more variety in tasks because of work to be done for the different agencies; better trials; better records; fewer obstructive tactics by opposing counsel; fewer appeals to the Boards and Commissions; and fewer appeals to the courts. The mechanical problems of political insulation and where and under whom to put such a "panel" would be less important than the change which would be wrought in the administrative process, for the Garrison suggestion really relates to the administrative process generally and not to the National Labor Relations Board alone.

If such an independent panel were to be set up, there would be an almost inevitable tendency for the trial examiners within the agency to specialize, since the technicalities of a multitude of different agencies would be too much for even the most competent men to master; and without such specialization there would likely be tremendous confusion and a bewildering array of differing interpretations of the laws under which each particu-

<sup>18</sup> Smith Hearings, Vol. II, No. 13, p. 497.

lar agency operated. Yet to have the specialization might tend to destroy the independence which would be its *raison d'être*.

As the administrative process has developed, the trial examiner not only carries judicial functions, but he also calls the attention of the Board to matters of policy and interpretation of the law and makes administrative decisions in order to expedite hearings and to economize the staff and funds. Such is possible because the Board controls the trial examiner as a part of the whole administrative process, and the trial examiner is conversant with Board policies. If the panel idea were to be used, it would mean, even with the specialization necessary to implement the public policy as interpreted by the agency, the crystallization of the functional processes into separate categories under the administrative process as a whole. This might be a self-defeating "improvement," for the vitality of the administrative process has been in the combination of functions, not in their separation; hence such a change should be well contemplated and considered before introduced.

Under the Act, testimony or documents may be subpoenaed by the Board for the hearing.<sup>19</sup> Applications are filed with the regional director prior to the hearing and with the trial examiner during a hearing. Under the Board's rules and regulations such applications must ". . . be timely, and shall specify the name of the witness and the nature of the facts to be proved by him, and, if calling for documents, must specify the same with such particularity as will enable them to be identified for purposes of production."<sup>20</sup> The rule is so stated in order to prevent respondents going on "fishing expeditions" and ascertaining knowledge about union records which can be used against the union later or during the hearing. It is also desired to avoid the use of the subpoena to obstruct and delay or to obtain evidence which, when presented, would be irrelevant.<sup>21</sup>

In the event the Board errs, there is remedy in the courts upon review of the case. Such review, however, did not repair what even the Board came to view as an unfair subpoena procedure

<sup>19</sup> Appendix I, Section 11(1). Only a member of the Board may issue the subpoena under the Act.

<sup>20</sup> Series 2, Article II, Section 21.

<sup>21</sup> The employer sought subpoenas to summon 1000 witnesses in the *Inland Steel* case. See H. Hearings on Independent Offices Appropriation Bill for 1939, 75th Congress, 2d Session, p. 735.

as it existed for several years. Since the Act requires that the subpoena be issued by a Board member, any applicant facing a hearing was required to apply to the Board and file his application in Washington, in contrast with the trial attorney for the Board who simply applied to the regional director or trial examiner, who were supplied with a sheaf of subpoenas already signed.<sup>22</sup> The basic unfairness attaching to the procedure as between the routine facing the respondent and that facing the Board's trial attorney led to sufficient criticism which, together with criticism from the trial examiners and regional directors, was sufficient to bring in 1938 a change in the method of issuing subpoenas.<sup>23</sup> In form, the Board still issues the subpoena and is re-

<sup>22</sup> Some regions even turned over to the regional attorney the signed subpoenas, so that no control was exercised by the regional director or trial examiner. The Attorney General's committee regarded this practice as too much freedom leading to unjustified use of the subpoena power. Monograph No. 18, p. 45.

<sup>23</sup> In *Wilson & Co. v. N.L.R.B.*, 103 F. (2d) 243, CCA-8, the employer pleaded that the Board's subpoena procedure violated due process requirements; but the court ruled to the contrary. In the *Fansteel* case, 306 U. S. 240 (1939), the employer argued in his brief that he was denied due process by the procedure; but the Supreme Court made no mention of the argument in its decision.

In *Inland Steel Co. v. N.L.R.B.*, 109 F. (2d) 9, CCA-7, the court severely criticized the subpoena procedure. This decision, handed down January 9, 1940, came late, since the Board proceeding began in 1937 and the hearing before the trial examiner was completed October 13, 1937. The following excerpts do not, then, apply to present Board procedure. The excerpts are of importance because they indicate the objections to the subpoena procedure as originally used, and in chastising the procedure the court used a phrase that has been widely quoted to "prove" that the administrative process must be changed. The use of the phrase is really indicative of the court's own opposition to the rise of the quasi-judicial process. Italics are supplied.

" . . . The Board . . . argues that the [subpoena] rule does not apply to it because it is not a party to the proceedings . . . The fact is, the rule was not applied to counsel for the Board, and, therefore, he was not required to file such application. When petitioner raised the question . . . counsel for the Board stated:

That the rules and regulations do not provide that the Board must apply to itself for subpoenas; that to construe the rules in that manner would be ridiculous; and that for both of those reasons the practice is that the Board does not apply to itself for subpoenas."

"Assuming that counsel for the Board correctly appraised the situation, and we think it did, it disclosed the unfairness of the procedure employed. It also illustrates, in a minor fashion, what this record, as a whole, convincingly discloses—that is, the danger of imposing upon a single agency the multiple duties of prosecutor, judge, jury, and executioner. The further assumption that the ruling of the Trial Examiner was in compliance with the Board's rule does not improve the situation—it merely shows the rule itself is unfair and discriminatory.

". . . Petitioner was required to make application for subpoenas, not to the Examiner or Regional Director, but to the Board or a member thereof in Washington, specifying the name of the witness and the nature of the facts to be

sponsible for it, but discretion rests in the regional directors and trial examiners for the use to be made of the subpoena power.<sup>24</sup> Criticism has apparently subsided since the employer may equally with the Board attorney obtain material needed for his defense, and delay resulting from the Board itself passing on subpoena requests has disappeared. Delay was often said to be injurious since the time necessary to obtain approval from Washington during a hearing was so great as to destroy the effectiveness of the testimony or document to be offered in evidence. Whether the application shall be granted or refused is still a matter of discretion, and there is insistence upon the applicant's indicating the nature of the testimony to be produced.

The Act provides that "In any such proceeding [hearing] the rules of evidence prevailing in courts of law or equity shall not be controlling."<sup>25</sup> The assumption of the statute is, as in other statutes creating similar tribunals, that the Board will decide cases in accordance with the weight of the evidence. When cases go to reviewing courts, Board findings as to the facts must be accepted by the court if such findings are supported by "evidence." From the Board's inception there has been court review of the Board's evidence procedure under the allegedly "inadequate" evidence proved by him.' How the Board in Washington, or a member thereof, could be in a position to determine the materiality of 'the nature of the facts to be proved,' especially where the issues were as numerous and complicated as they were in the instant case, it is difficult to understand. Waiving aside this thought, however, a burden was placed upon one side which did not exist as to the other in the matter of obtaining witnesses. The situation may be aptly stated thus: Petitioner, in order to obtain a subpoena, was required to present to its opponent an application therefor with notice as to what it expected to prove by the witness desired to be subpoenaed. Thus, it was within the discretion of the Board (the prosecutor if not a party) to determine when process should issue in favor of the one to be condemned."

"It is further argued by the Board that petitioner's complaint is without merit because there is no showing that evidence favorable to it was excluded. This argument begs the question. We are not now considering the extent to which petitioner was prejudiced, but whether it was, by such procedure, deprived of a substantial right, or whether the procedure employed placed it at a disadvantage in contrast with its opponent. It is also argued that the rule is reasonable because petitioner . . . has a right to make application to this court to adduce additional evidence. This argument also is not tenable. Such provision has no bearing upon what we regard as an unreasonable and unfair restriction upon petitioner's right to the process of subpoena."

<sup>24</sup> With the exception already indicated in the investigation stage, where Board approval is necessary.

<sup>25</sup> Appendix I, Section 10(b).

requirements, yet there has been widespread and heated criticism directed against the Act because it does not require the Board to follow the rules of evidence prevailing in courts of law.

The Board's evidence requirements are for all intents and purposes identical with those of other administrative agencies; and in one of the original cases coming before the Supreme Court in 1937, it was held that "In the case of statutory provisions like . . . [the findings of the Board as to the facts, if supported by evidence, shall be conclusive], applicable to other administrative tribunals, we have refused to review the evidence or weigh the testimony and have declared we will reverse or modify the findings only if clearly improper or not supported by substantial evidence;" and that, "there was *substantial* evidence to support the findings."<sup>26</sup>

The Court further extended this qualification of "substantial" in the *Consolidated Edison* case: "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . , and "The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. . . . But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."<sup>27</sup> Again the Court held that the evidence was adequate under this more elaborate test.

This interpretation by the Supreme Court as to the quality and quantity of evidence did not discourage the circuit courts from occasionally entering their own judgment as to the facts, thereby displacing the Board's. This problem, too, was thoroughly aired by the Supreme Court in the *Waterman Steamship* case, decided February 12, 1940, a case which did not receive any considerable publicity, yet the decision of which struck at the circuit courts for substituting their judgment for that of the Board in determining facts:

<sup>26</sup> *Washington, Virginian & Maryland Coach Co. v. N.L.R.B.*, 301 U. S. 142 (1937). Italics supplied.

<sup>27</sup> *Consolidated Edison Co. of N.Y., Inc., v. N.L.R.B.* 305 U. S. 197 (1938).

"The court below . . . decided that the Board's order was not supported by substantial evidence, said the order was based on mere suspicion, and declined to enforce it. Whether the Supreme Court properly reached that conclusion is the single question here.

"We do not ordinarily grant certiorari to review judgments based solely on questions of fact . . . however, the Board earnestly contended that the record presented 'clear and overwhelming proof' that Waterman Steamship Company had been guilty of a most flagrant discrimination . . . , and that the Court had unwarrantedly interfered with the exclusive jurisdiction granted the Board by Congress. The Board's petition also charged that the present was one of a series of decisions in which the court below had failed 'to give effect to the provisions of the Act that the findings of the Board as to facts, if supported by evidence, shall be conclusive.'

"In that Act, Congress provided, 'The findings of the Board, as to the facts, if supported by evidence, shall . . . be conclusive.' It is of paramount importance that courts not encroach upon this exclusive power of the Board if effect is to be given to the intention of Congress to apply an orderly, informed and specialized procedure to the complex, administrative problems arising in the solution of industrial disputes. As it did in setting up other administrative bodies, Congress has left questions of law which arise before the Board—but not more—ultimately to the traditional review of the judiciary. Not by accident, but in line with a general policy, Congress has deemed it wise to entrust the finding of facts to these specialized agencies. It is essential that courts regard this division of responsibility which Congress as a matter of policy has embodied in the very statute from which the Court of Appeals derived its jurisdiction to act. And therefore charges by public agencies constitutionally created—such as the Board—that their duly conferred jurisdiction has been invaded so that their statutory duties cannot be effectively fulfilled, raise questions of high importance. For this reason we grant certiorari.

" . . . The Court of Appeals' failure to enforce the Board's order resulted from the substitution of its judgment on disputed facts for the Board's judgment,—and power to do that has been denied the courts by Congress. Whether the court would reach the same conclusion as the Board from the conflicting evidence is immaterial and the court's disagreement with the Board could not warrant the disregard of the statutory division of authority set up by Congress."<sup>28</sup>

<sup>28</sup> *N.L.R.B. v. Waterman Steamship Corp.*, 309 U. S. 206 (1940). While a few circuit courts have tried cases *de novo*, for the most part they have not been antagonistic to the board.

The development of the evidence rules relating to administrative agencies began with a ruling by the Supreme Court in a case involving the Interstate Commerce Commission. The Court, while recognizing that the act under which the Commission operated did not free the Commission from the technical rules of evidence, held that the Commission's proceedings were not limited by such rules.<sup>29</sup> When the reason for rules of evidence is understood, the criticism against the Board's evidence procedure crumbles, for the administrative process is the opposite of that situation which evidence rules are designed to govern, namely, the jury trial. Lay juries, it was recognized in the past, are susceptible to evidence which might excite prejudice or mislead a person untrained in ascertaining facts through legal processes; and hence rules of exclusion were developed on the theory that inclusion of evidence would be more harmful than its exclusion.<sup>30</sup> The need, then, for abiding by rules of evidence in a court of law is evident only when it is clear that the trier of the facts is incapable and inexpert. The administrative agency is not inexpert and incapable. The agency is designed to be an expert body; it has as a leading function the weighing of evidence and the ascertainment of facts; and its whole career in practice is largely devoted to an experiential operation following the design. There appears no valid reason why this should be changed.

The trial examiners have the responsibility in the first instance of passing on the admissibility of the evidence. Their instructions read:

"It is extremely difficult to state with any exactness what should or should not be admitted as evidence. Perhaps the best rule to use regarding the admission and exclusion of evidence is the statement of the Court in the case of *John Bene and Sons, Inc., v. Federal Trade*

<sup>29</sup> *I.C.C. v. Baird*, 194 U. S. 25 (1904), and *Spiller v. A.T.S.F.*, 253 U. S. 117 (1920). See the testimony of the Board's General Counsel Fahy, *S. Hearings on N.L.R.A.*, Part 15, p. 2849. The provision now common was first incorporated in the Federal Trade Commission Act in 1914. *Smith Hearings*, Vol. II, No. 12 p. 402.

<sup>30</sup> Currently there are some ninety different rules of evidence, which bewilder even the legal profession to such an extent that the American Law Institute has set up a group to draft a model statute on evidence. (The Code, as tentatively drafted, states rules of admissibility more liberal than those used by the Board.) The Federal court system is now loosening the rules of evidence, and scholars likewise are recognizing the need for fewer evidence restrictions. *Smith Hearings*, Vol. II, No. 12, p. 403.

*Commission* (299 Fed. 468, CCA-2). In that case the Court said: 'Evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done.'

Further,

"The rules of evidence should not be totally disregarded. Hearsay evidence should be avoided as far as possible."<sup>31</sup>

In practice, the Board's rules on the reception of evidence correspond with the rules in the United States district courts, and the Board has been commended by the Attorney General's Committee on Administrative Procedure for such correspondence. The only departures therefrom relate to the best-evidence rule: For example, the trial examiner may in his discretion require only excerpts or oral statements as to the content of, say, books, rather than the production of the books themselves.<sup>32</sup> To the Board, and in turn to the trial examiners, the chief character of evidence is that it must be material, relevant, and tend to prove or disprove the matter being litigated. This means that the discretion and judgment of the trial examiner must operate,<sup>33</sup> and it also means that irrelevant evidence enters the record, although such evidence does not cancel the relevant and material evidence which is also in the record and which forms the basis for a finding and order. The Board has endeavored to raise the general level of trial work and improve the character of evidence. In order to correct weaknesses, the review attorney is used as an internal check to report on the conduct of the Board attorney and trial examiner, the general tenor and level of the hearing, the presenta-

<sup>31</sup> Smith Hearings, Vol. II, No. 12, p. 406.

<sup>32</sup> H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, p. 517.

<sup>33</sup> In the St. Louis *Ford* case the trial examiner, against his own wishes and judgment, followed the instructions of the Board's chairman to admit irrelevant evidence. A former Board employee testified that the Board was biased in favor of the CIO; and the chairman thought the Board should, as a matter of administrative policy and not as passing on the issues, be thereby open to the criticism of its employees. Smith Hearings, Vol. II, No. 12, p. 406; Vol. II, No. 1, p. 26.

Chairman Madden testified that some trial examiners operated under strict rules of evidence and some did not but that the records were not substantially different. In his opinion, the talk about hearsay evidence was exaggerated.

tion of testimony, and other such matters in each "trial." When trial examiners admit hearsay evidence, it will not be used in deciding cases unless it is corroborated.<sup>34</sup> In the admission or exclusion of evidence, a function subject to court review, the Board and trial examiners have a laudable record: Through October 8, 1941, no Board orders had been set aside because of laxity in this category.<sup>35</sup>

The record of the hearing is made by an official reporter, who works under the contract system usually employed by the Federal Government in such fields. Because the Government, through an annual contract, obtains the transcript of the hearing at a much lower rate than does the public, that is, the employer, criticism has been brought on the grounds that the high cost of the Board's proceedings as related to the record has been detrimental to the respondents.<sup>36</sup> Other elements of cost such as counsel fees, which the respondent must meet, and witness fees, which are paid by the summoning party, must be included in the respondent's costs.

If the respondent desired to obtain typewritten transcript of the hearing, his cost as charged by the reporting agency outside the city of Washington would have been as follows:<sup>37</sup>

#### TRANSCRIPT COST PER PAGE

Year	<i>"Regular Copy"</i>		<i>"Daily Copy"</i>	
	Respondent's cost	Board's cost	Respondent's cost	Board's cost
1935-36	0.35	...	0.35	...
1936-37	0.40	...	0.45	...
1937-38	0.44	0.12½	0.55	0.25
1938-39	0.50	0.06½	0.60	0.15
1939-40	0.35	0.04	0.55	0.10

<sup>34</sup> Smith Hearings, Vol. II, No. 12, p. 404.

<sup>35</sup> S. Hearings on N.L.R.A., Part 15, p. 2849, and Courtesy of the Information Division of the N.L.R.B.

<sup>36</sup> Of the cases actually decided to June 7, 1939, in 10.4 per cent the number of employees ranged from 21 to 100; in 45.3 per cent from 101 to 500; in 23.4 per cent from 501 to 1000; in 20.9 per cent over 1000 employees. In no case was the number of employees less than 20. In all cases met with by the Board, there are a small number of employers having fewer than 20 employees to be found—probably between 2 and 3 per cent. Apparently the "small business-man" seldom goes through the Board hearing. H. Hearings on N.L.R.A., Vol. II, P. 618.

<sup>37</sup> Figures on page records and costs, except where otherwise noted, are to be found in Smith Hearings, Vol. II, No. 12, pp. 488-491. The price differential existing as between the agency and the public is common to other agencies.

The Board's experience was that, in 1938-1939, three out of five respondents used "regular" copy, the others used "daily" copy, although a goodly number purchased no copy at all.

The length of the records produced from 1935-1939 and application thereto of the contract price, will indicate the cost involved for a respondent. The records compiled for each year were as follows:<sup>38</sup>

#### AVERAGE LENGTH OF TRANSCRIPT

<i>Fiscal year</i>	<i>All hearings</i>	<i>All hearings under 5000 pages</i>
1935-36	517	517
1936-37	361	341
1937-38	712	581
1938-39	672	495
1935-39	650	521

These figures include unfair labor practice cases, representation cases, and cases consolidating unfair labor practice and representation cases. The representation cases averaged, for 1197 respondents, 159 pages. Applying an average transcript cost of 45 cents per page over the period would yield a cost of \$72 for the transcript for the hearing. The longest hearing ran 3500 pages. For the 1140 unfair labor practice cases, averaging 1068 pages, the cost would have been \$462, although if the 31 hearings exceeding 5000 pages be excluded, the average would drop to 792 pages and a cost of \$357.<sup>39</sup> Eight hundred twenty-eight of the

<sup>38</sup> The estimates are based on "regular" copy and do not take account of what the respondents would have paid when they received "daily" copy; hence these figures are deflated below the actual outlays made by respondents. The cost was greatly increased when respondents received "hourly" copy, as has happened. The complainant has no cost of this nature unless he is represented by counsel and he desires a copy of the record. The employer usually obtains a copy, but both the union and employer have equal access to the copy remaining in the possession of the Board. Still, the employer often regards the Board as prosecuting the case for the union and the union as thereby having a considerable financial advantage. No litigation costs are assessed against the losing party, as in other litigation.

<sup>39</sup> As of January 1, 1940, the case of the *Weirton Steel Co.* had the longest record, 89,101 pages; and it cost the Board \$4,812.83. H. Hearings, F.S.A. Appropriation Bill for 1941, 76th Congress, 3rd Session, Part 1, p. 611. Such a record obviously is expensive for all parties, but perhaps such cost is a small element in cases of this nature. Such long records make severe demands upon the Board's machinery; for example, the trial examiner's intermediate report is a heavier burden whenever the record is long.

1140 hearings had transcripts of 1028 pages or less. The consolidated cases averaged, for 320 employers, 1134 pages for the hearing, a cost of \$511, although if the cases exceeding 5000 pages be excluded, the average drops to 955 pages and the cost to \$430 per hearing.

The trend of unfair labor practice case records may be indicated by the following figures:

#### AVERAGE LENGTH OF TRANSCRIPT

<i>Fiscal year</i>	<i>All hearings</i>	<i>All hearings under 5000 pages</i>
1935-36	555	555
1936-37	773	725
1937-38	1065	820
1938-39	1228	860

These figures enable one to understand why the Board has been earnestly endeavoring since 1937 to reduce the size of the record. A stipulation as to facts, especially those pertaining to interstate commerce, has been extensively used; pretrial conferences to narrow issues have been tried and developed; there has been limitation of cross-examination; "off-the-record" proceedings, such as motions and objections arguments, have been engaged in, although this has several times called down the wrath of the misunderstanding courts; and finally, almost in desperation, there was organized supervision of the trial work under a specialized section of the litigation division, continued through the Case Clearance Unit, which brought improvement in the size of the record.<sup>40</sup>

To provide for those cases going from the Board to the courts on appeal, the Board has endeavored to reduce the costs, which are usually high because of the printing requirement in some of the circuit courts. Through Board request and cooperation the fourth, fifth, ninth, and tenth circuits adopted rules to require

<sup>40</sup> The increase in the size of the record after 1937 reflects a change in the tactics of Board opponents. Prior to 1937 the legal battleground was constitutionality. After April, 1937, the attack shifted to a "merits" basis; and this brought a train of witnesses, much cross-examination, more work for attorneys in regional offices to prepare and conduct hearings on complaints, and an encumbered, long, and heavy record. It followed that trial examiners had to stay longer on cases, they had to spend more time on the intermediate report, and the whole machinery slowed down.

printing of only the formal proceedings in the record plus such parts as the parties designate. The printing is done by the parties and attached as appendices to their briefs. A similar system prevails in the third, sixth, and seventh circuits whenever the parties so stipulate. In the eighth circuit, the court requires no printing whatsoever, and the Board may simply certify five copies of the typewritten record.<sup>41</sup> In all cases going to review, the Board itself certifies and files the record with the court. This represents an advantage for the employer over ordinary litigation, where the party appealing would be required to bear the entire burden.

Despite the attempts of the Board to reduce the cost of hearings, it appears fair criticism that it is expensive for an employer to enter a Board hearing. Regional directors themselves have urged settlement in order that the employer may avoid expense. But expense does not excuse the respondent; for if an investigation leads to a hearing, there is strong belief that the law has been violated, and the respondent should have the responsibility of carrying the legal cost of defense. The attempts of the Board to make that cost as reasonable as possible is indicative of the attitude with which the Board has approached its task.

Under the rules and regulations, the parties have a right to argue orally before the trial examiner and to file briefs,<sup>42</sup> although the oral argument may or may not be incorporated in the record of the hearing at the discretion of the trial examiner. Seldom does the Board's trial attorney argue orally at the conclusion of the hearing and almost never files a brief, not because it would be poor procedure but because the burden is such that time can not be spared to draw up a brief properly.<sup>43</sup>

## B. The Intermediate Report

The Act does not specify the use of the intermediate report; but the Board has incorporated the report, as drawn up by the trial examiner, in the proceedings routine. The trial examiner, at the

<sup>41</sup> Smith Hearings, Vol. II, No. 12, p. 490.

<sup>42</sup> Series 2, Article II, Section 29; Fifth Annual Report, N.L.R.B., p. 12.

<sup>43</sup> The Committee on Administrative Procedure regards this failure to use the trial attorney's knowledge of the case after the close of the hearing, at least through the brief, as sheer waste. Monograph No. 18, p. 50.

close of a hearing, ordinarily returns to Washington and there writes up the report, although the burden carried by the examiners has been at times so heavy that it has been impossible always to return to Washington; hence the report was often written in the field while the examiner was hearing another case. This did not permit concentration by the trial examiner, and the Board desired to have a sufficient number of trial examiners so that the reports would reflect the full energies of the person who heard the case. Personnel shortage in the past made it impossible for the trial examiner to devote the proper time and attention to the report. This shortage was lamentable, for although the report is only advisory in character, it becomes a part of the formal record and is a public document in the case so that the Board, the court, and the public may see the judgment of the trial referee as to the merits of the controversy. It is likely, too, that compliance with the Act lagged, especially in the early years, because the inability of trial examiners to render intermediate reports within a shorter period led respondents to carry cases on to the Board; and more prompt action by the trial examiner would probably have provided the basis for more settlements.

The trial examiner is supposed to sit down with the record, read it thoroughly, refer perhaps to his notes, weigh the evidence and consider its credibility, refer to the exhibits, and then draft the intermediate report. In nature, the report outlines the decision which might be expected to follow in the event the case goes through the decision stage: There is a statement as to the nature of the case; the procedural steps are indicated; motions and objections are stated or perhaps even there ruled upon; the case is analyzed in terms of facts; and the conclusions of the trial examiner are stated. Thereupon the examiner recommends an order to rectify the violation. Such order may be based upon the complaint being sustained in full or in part, and the complaint may be dismissed in full or in part. If the examiner dismisses the complaint in full and if the complainant does not file exceptions, then the case is closed. Too, the case is closed if the employer complies with the recommendations. But if the employer does not comply with the recommendations or if he files exceptions to the recommendations in whole or in part, which he often does, then the case will come before the Board for decision; and the

transcript of the record and the exhibits are sent to the Board. The Board receives the original of the intermediate report, and copies of the report are served on all parties when it is issued by the trial examiner.

Prior to the spring of 1938, the chief trial examiner attempted a hasty review of each and every intermediate report written. Hearings at that time were running as high as 150 per month; and, added to the administrative duties of the chief trial examiner, it was an impossibility for him to read the reports with a view to correcting quality, contents, and form. An assistant chief trial examiner was appointed to aid the chief trial examiner, and later another assistant was appointed. Also, in the fall of 1938, the division began to hold weekly meetings of all trial examiners in Washington in an attempt to improve the quality of the reports. At such meetings the latest Board and court decisions were discussed, and policy matters were considered, so that the examiners would be fully informed and in receipt of suggestions on the conduct of hearings. The addition of aides for the chief trial examiner and the weekly meetings did not suffice to bring the results desired; so in time the Board, encouraged by the chief trial examiner, approved a review system within the trial examining division, a system which had been experimented with beginning in February, 1939.

Beginning August 1, 1939, the trial examiner's report, when drafted, was sent to the chief trial examiner, who in turn allocated it to another trial examiner for review purposes. No regular review section was kept intact; the trial examiners rotated on the work. No hierarchy of ability, between those who heard and those who reviewed, was visualized. Rotation was simply an offset for tediousness. The trial examiner who reviewed the intermediate report and made a rapid overall check to ascertain whether there were errors in names, places, dates, figures, and such matters held a discussion of the merits with the trial examiner who heard the controversy. It was not unusual for the two trial examiners to discuss the case with the chief trial examiner or his assistants, in order to ascertain from the transcript and the exhibits the validity of the intermediate report as demonstrable by the evidence. The intermediate report drawn up in the first instance, then, really was a tentative one which was redrafted after review. And after

review the report was carefully checked by the chief trial examiner or an assistant to make certain the form and language were proper and to ascertain that the conclusions based upon the facts, and the recommendations based upon the conclusions, did not conflict with current Board policy. The tentative draft became the permanent one if there was no major change agreed upon or if the examiner who heard the testimony and saw the witnesses refused to change the first draft. It is important to note that the examiner who *heard* and *saw* was not subjected to the views of the examiner who did not hear and see, for some criticism has been based upon such an idea. The chief trial examiner has stressed that such is not true, but rather the review was based upon an earnest desire to have the intermediate reports correct. The review within the examining division accomplished two purposes:

(1) It discovered minor and major errors in findings of fact. Rather than being primarily a matter of competency or incompetency of the personnel, this was a matter of lengthy and difficult cases assuming such proportions that the trial examiners welcomed criticism and help in an effort to prevent slips in dates, names, and such matters. Too, the Board was constantly rendering decisions and interpretations, and the intermediate report had to be correct in that respect. The chief trial examiner could not be expected to review all of the reports thoroughly, many of which represented thousands of pages of record. This review system was, therefore, relied upon to prevent errors, both minor and major, in the findings of fact and thereby to prevent exceptions to the intermediate report and bring more compliance.

(2) Review enabled an early discovery of any error committed by the trial examiner in the conduct of the hearing; and the Board, under its rules and regulations, could then reopen the hearing in order to correct any injustice done.

When the Congress reduced the Board's appropriations for fiscal 1941, the trial examiners division was reduced from 36 to 26 hearing examiners. Without any increase of case intake, the division could just about hold its own but could not reduce the backlog. The increased flow of cases in 1941 meant, without additional trial examiners, that the division was falling behind its docket, even after the Board arranged for regional attorneys rather than

trial examiners to hear all but very important or difficult representation cases. In an effort to keep up with the work, the review system within the trial examiners division was altered by the appointment of five associate attorneys so that regular trial examiners could be used for hearings at closer intervals. The essential function of the six associate attorneys is to serve as law clerks to the trial examiners in their preparation of the intermediate report, thus supplanting the review system; and the new organization has functioned well.<sup>44</sup> Regular trial examiners hear only about 20 per cent of all representation cases, and the balance are heard by Board attorneys. The changes made in the division have resulted in approximately a sevenfold increase in the number of hearings held per month; and this, combined with staff additions in late 1941, may enable the division to become "current."

The institution of review of intermediate reports before the final report was served on the parties was probably instrumental in increasing the impression that a fair hearing had been held. While the statistical support is meager, it does, especially when fortified with the emphatic support of the chief trial examiner as to the efficacy of the review system, indicate an improvement in the compliance record. Up to the installation of the review system, there had been 928 intermediate reports issued, in 45 of which there was compliance, a percentage of roughly 4 per cent. Between August 1, 1939, and January 1, 1940, 63 intermediate reports were issued, in 5 of which there had been compliance; and compliance was expected in 6 more, for a minimum percentage figure of 7 and a likely per cent figure of 17.<sup>45</sup> The installation of law clerks to aid the trial examiners will probably be instrumental in bringing still more compliance.

In contemplation, the intermediate report should be extremely useful and should be the machinery for resolving many controversies by settlements so that only a few cases reach the Board; it should crystallize and clarify the issues so that they stand in clear relief from their trappings, thereby promoting the flow of those cases going through the Board decision stage; and it should provide the Board and court with the judgment of the one who heard and saw the witnesses. Because of the heavy burden trial ex-

<sup>44</sup> H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, pp. 498, 510, 554. Also, courtesy Mr. George Pratt, Chief Trial Examiner.

<sup>45</sup> Smith Hearings, Vol. II, No. 5, p. 126; and Monograph No. 18, p. 68.

aminers had to carry and their consequent inability to draft proper intermediate reports, together with the absence of adequate supervision of the trial examining division for a long period and a failure by the trial examiners to understand the report's importance,<sup>46</sup> the intermediate report for years served as an outline of the case and little more. Since 1938 real and constant efforts have been made to improve the report, and improvement is still being shown. As late as 1940, however, the trial examiners too often failed to read the record carefully and relied too much on their memory and notes of the case, so that the review section had to check carefully the record, to find too often the inadequacy of the trial examiner's report.<sup>47</sup> With insufficient analysis of the facts and a shortage of reasoning to support the conclusions, the recommendations of intermediate reports have not been followed as much as one might wish. For example, of 392 decisions issued following an intermediate report, the Board followed the recommendations of the intermediate report in 288, or 73.5 per cent, of the cases and rejected the recommendations in 104, or 26.5 per cent, of the cases. Of the 104 rejections, in 13 the trial examiner had recommended dismissal of the complaint; in 23 the examiner had recommended the dismissal of the complaint in part; in 43 the examiner's report had found in favor of the Board and was rejected in part; and in 25 cases the finding of the intermediate report was rejected in full.<sup>48</sup>

Ordinarily the Board transfers the case from the region to itself upon the issuance of the intermediate report and its receipt from the regional director. But the Board maintains the right to transfer a case to itself at any stage of the proceeding, and this it has done when it has "snatched" cases from trial examiners.<sup>49</sup>

<sup>46</sup> Until November, 1937, the division was under the direction of the secretary's office. At that time it was separated and made an autonomous unit, subject only to the Board itself. Mr. George Pratt has served as Chief Trial Examiner since 1937.

<sup>47</sup> It has been estimated that trial examiners did not read the record in more than one half the cases. The trial examiners have, of course, heard the testimony that is in the record, and it may be that there was necessity of reading only that portion of the record not distinctly remembered.

<sup>48</sup> Smith Hearings, Vol. II, No. 18, p. 528. The figures cover the period from November, 1935, to September 15, 1939. The 288 recommendations followed by the Board included 11 cases where the reports recommended dismissal of the complaint.

<sup>49</sup> Rules and Regulations, Series 2, Article II, Sections 32, 36. The chief trial

Apart from the matter of whether such a "snatching" process intrudes on the freedom of trial examiners or leads to more careful work on their part, the reasons for such transfers are these: It may be that a strike situation is threatening, thus putting a premium on speed and absence of delay; the Board may have lost confidence in the ability of the trial examiner to write an intermediate report, a situation that appeared when the Board was using per diem trial examiners and which it found necessary to correct in order to save time and money; there may be a resignation by a trial examiner, or a substitution of one for another, leaving no one person responsible for the report; or an affidavit of bias may be filed against the trial examiner, and such action would necessitate a transfer. The fact that the examiner may have already drafted the intermediate report is no bar to transferring a case; and there have been instances where the Board, even though it had ordered the case transferred, requested the preparation of a draft intermediate report. The chief trial examiner, for his own purposes, has sometimes requested the examiner to prepare a memorandum on a transferred case; but this has no bearing on the Board's consideration of the case. Ordinarily the trial examiner may be expected to cease all activity in the case when it is transferred to the Board, which may be in the middle of a hearing. A case transferred because of bias must be reheard, but often the transference of a case means only that instead of an intermediate report there are substituted a proposed finding and proposed order which are served on the parties and to which there may be exceptions.

From the Board's inception until the Supreme Court decision in the *Morgan* case in 1938,<sup>50</sup> whenever the Board "snatched" a case there was no intermediate report nor were there a proposed finding and proposed order. In such event the Board sent the parties a copy of the order that had been sent to the trial examiner trans-

examiner estimated that some 40 to 50 cases were transferred from November, 1938, to the last of 1939.

<sup>50</sup> *Morgan v. U. S.*, 304 U. S. 1 (1938). In a preceding case, *Morgan v. U. S.*, 298 U. S. 468 (1936), the plaintiffs contended that they had not been accorded the "full hearing" required by law as prerequisite to an order issued by the Secretary of Agriculture. The district court had struck the plaintiffs' allegations that the Secretary had issued the order without hearing or reading the evidence, without hearing or considering the arguments. The Supreme Court held that the district court was in error, that the defendant was required to answer the allegations, and that the court should determine whether the plaintiffs had a fair hearing. The case was remanded to the district court.

ferring the case and calling for all materials. The parties were notified that they could file briefs; and after sufficient opportunity to file briefs was offered the parties and after opportunity to appear, the Board reviewed the case and handed down its decision and order. This procedure the Supreme Court upheld, although not until the *Mackay* case and the *Consolidated Edison* case following the second *Morgan* case.

In the *Morgan* case the Secretary of Agriculture had issued a rate order based upon voluminous testimony and exhibits and findings thereon; but the Government had offered no brief, formulated no issues, and furnished the respondent with no statement or summary of its contentions. No proposed findings and proposed order were issued, and the Government refused a request that the examiner render a tentative report upon which the respondent could base exceptions and argument. This procedure the Supreme Court regarded as violating the requirements of due process, and it held that those who are proceeded against by a quasi-judicial agency are entitled to be fully informed of what the Government proposes and are to be given opportunity to be heard on those proposals before the agency gives its final command.<sup>51</sup> While in this case the Court found that there was no presentment of the Government's claims and that the oral argument did not reveal the claims appropriately, a situation unlikely under the Board's procedure, still the Board regarded the *Morgan* decision as sufficiently dangerous in terms of possible reversals to justify a change in its own procedure, so that in every case there would be either the intermediate report or, in transferred cases, a proposed finding and proposed order served on the parties, with opportunity accorded to file exceptions thereto.<sup>52</sup>

The Board met legal difficulties when it attempted to improve its own procedure. In a proceeding against the Republic Steel Corporation, the Board had issued an order which the respondent petitioned the third Circuit Court of Appeals to review. Before the Board filed the transcript of record with the court, the *Morgan* decision came down; and the Board at once desired to set aside its order so that it might amplify its procedural safeguards.<sup>53</sup>

<sup>51</sup> *Ibid.*

<sup>52</sup> Rules and Regulations, Series 2, Article II, Sections 32-33, 37.

<sup>53</sup> The Act permits it to set aside its order any time prior to filing the transcript with the court. Appendix I, Section 10(d).

The circuit court denied the Board's request and issued a restraining order, whereupon the solicitor general petitioned the Supreme Court in an original suit for a writ of mandamus and a prohibition against the judges of the third Circuit Court of Appeals. The Supreme Court upheld the Board's position, and the order was set aside.<sup>54</sup>

The propriety of a similar action was at issue before the Supreme Court a few months later in the *Ford* case,<sup>55</sup> with a similar result. The question was whether the circuit court had properly remanded a case to the Board so that it could set aside its order and accord to the company a procedure which would include a proposed finding and proposed order, the absence of which it was claimed invalidated the Board's order.

In the *Mackay* case,<sup>56</sup> decided shortly after the *Morgan* decision, the Board had transferred the case to itself at the conclusion of the testimony and prior to oral argument before the trial examiner and later refused to resubmit the case to a trial examiner and the issuance of an intermediate report. The respondent did have oral argument before the Board and did file a brief, but the respondent urged that the absence of a tentative report by the trial examiner and opportunity to file exceptions and engage in a hearing thereon deprived the respondent of an opportunity to point out to the Board that there was a fatal variance between the allegations in the complaint and the findings made. The Supreme Court held, however, that ". . . the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights . . . The contention that the respondent was denied a full and fair hearing must be rejected."<sup>57</sup>

In the *Consolidated Edison* case<sup>58</sup> the respondent received no tentative report of the findings; and there was no opportunity given for oral argument before the Board itself, although the re-

<sup>54</sup> In the *Matter of National Labor Relations Board*, 304 U. S. 486 (1938).

<sup>55</sup> *Ford Motor Co. v. N.L.R.B.*, 305 U. S. 364 (1939).

<sup>56</sup> *N.L.R.B. v. Mackay Radio and Telegraph Co.*, 304 U. S. 333 (1938).

<sup>57</sup> *Ibid.*

<sup>58</sup> 305 U. S. 197 (1938).

spondent filed a brief following the taking of evidence and the Supreme Court "assumed" the Board considered the brief. The Court held:

"It cannot be said that the Board did not consider the evidence or the petitioner's brief or failed to make its own findings in the light of that evidence and argument. It would have been better practice for the Board to have directed the examiner to make a tentative report with an opportunity for exceptions and argument thereon. But . . . we find no basis for concluding that the issues and contentions were not clearly defined and that the petitioning companies were not fully advised of them . . . The points raised as to lack of procedural due process in this relation cannot be sustained."<sup>59</sup>

From the holdings in the *Mackay* and *Consolidated Edison* cases it is apparent that the Board, even before it began to use the proposed finding and proposed order, always conformed to procedural due process. By the institution of the proposed finding form, the Board only added to the legal security it deemed necessary for its task. The result was favorable for the Board since it thereafter experienced fewer complaints on procedure, the litigation situation was improved, and no longer was there such a burden upon the Board to prove the basic fairness of its procedural methods. The minimum requirements of procedural due process were never the Board's standard; it always attempted to do more.

### C. The Board's Decision

It has been developed that if the respondent complies with the intermediate report, or if the intermediate report dismisses the complaint and no exceptions are taken by the complainant, the case is considered closed. If no exceptions are taken but there is not compliance, failure operates as a submission of the case to the Board on the record,<sup>60</sup> and it becomes necessary for the Board to render a decision. Too, if there is not compliance, there are usually exceptions; and here begins the decision stage of the Board's proceedings.

<sup>59</sup> *Ibid.*

<sup>60</sup> Rules and Regulations, Series 2, Article II, Section 35.

The respondent is permitted twenty days, or an extended period if it appears to the Board to be a legitimate request and not simply to delay and obstruct the progress of the proceeding, in which to file exceptions. The Board has also provided that the respondent may file the required request for oral argument within twenty days after the case is transferred to the Board, which would be after the intermediate report or proposed finding and proposed order is issued and served; and it permits the respondent to file a brief without requiring request to do so any time within thirty days after the case is transferred to the Board, or presumably within thirty days after a proposed finding and order issued.<sup>61</sup> All parties receive copies of the exceptions offered by the respondent.

The oral argument which follows is not confined to the exceptions filed, although they might be regarded as the basis for the oral presentation of the case. Practically, the Board never refuses to grant a request for oral argument, and in many of the cases there is oral argument.<sup>62</sup> When the Board grants the request, it notifies the parties as to the time and date of hearing, invariably a Tuesday or Thursday at the Board's hearing room in Washington.

The oral argument before the Board gives all the appearance of a labor court in session. The Board always notifies the national labor organizations of an argument at which an affiliate is presenting its case, and often the national organization will furnish counsel to argue the case for the affiliate. Across the table will sit counsel for the employer; and each side is given thirty minutes to present the case, although a longer period may be granted if the intricacies of the case appear to demand it. The Board, which possesses a summary of the case as drawn up by the review attorney and containing the pleadings, issues, and a broad statement of the case, may interject questions and refer to the record,

<sup>61</sup> Rules and Regulations, Series 2, Article II, Section 35. Until January 27, 1940, the rule pertaining to the brief required written request and permission from the Board before a brief could be filed, and the time period was only twenty days. N.L.R.B. Press Release R-2566.

<sup>62</sup> In the fiscal year 1938-1939:

Number of unfair labor practice cases decided on basis of records, 232; number of oral arguments held in cases decided on the record, 152; percentage of oral argument to cases decided on the record, 65.5. Smith Hearings, Vol. II. No. 14, p. 558.

briefs, or intermediate report. Since the argument is not narrowed to the exceptions alone, the members of the Board may ask questions covering the whole case.

The review section operates under the legal division as the Board's legal assistant, and the presence of such a section is recognition of the burden of a busy quasi-judicial agency. With hundreds of cases, many of which have transcripts running to thousands of pages, it is apparent that the members of the Board, when it is necessary to render a decision upon the record, must have aid. The review section functions only when decisions are to be made. Unlike the review section within the Department of Commerce, which functions to pass upon efficiency ratings, and unlike the bureau of formal cases within the I.C.C. or the board of review of the F.T.C., which are advisory agencies for the commissions, the review section of the Board functions as a legal secretary does for a judge. The section is composed of assistants under supervisors and all under an assistant general counsel. The members of the section are essentially legal craftsmen, who make no decisions of policy or law or substance but operate wholly to sift and analyze the records and to draft the decisions.

The intermediate report, the record, and the exhibits form the material for the review attorney's work. He studies the record carefully and thoroughly and compares his findings point by point with those the trial examiner has embodied in the intermediate report. Each review attorney has a supervisor, who is selected for unusual competence and experience. The supervisor reads the pleadings, the brief, the intermediate report, and the exceptions in order to become familiar with the case; and he exercises general supervision over the attorneys under him. For many months the supervisors supervised cases and the attorneys shifted with the case; but this was found to be unsatisfactory because of the rotation of cases, and the machinery was changed so that supervisors supervise the attorneys and the cases move through them.

The Board is very strict as to the report of the review attorney. The Act requires the Board to make its findings on the record: "If upon all the testimony taken the Board shall be of the opinion [there has been a violation] . . . then the Board shall state its

findings of fact and shall issue and cause to be served . . . an order . . ." <sup>63</sup> To avoid any possible conflict with this section of the Act, in October, 1939, the Board ordered that the review attorney was not to discuss the case with the trial examiner, since the trial examiner's report is reviewed very carefully by the review attorney. The Board was never content with such a prohibition, for the trial examiner was supposedly doing an impartial job for the Board, as was the review attorney. Chairman Madden thought the better practice might be to encourage conferences between the trial examiner who heard the case and the review attorney who assisted the Board. The Board was far more concerned to prevent case discussion between the trial attorney and the review attorney, since the trial attorney "prosecutes" the case.<sup>64</sup> All such Board attempts to restrict discussion indicate an attempt to separate the different functions within the administrative process.

The desire of the Board to base its decision on the record also affected internal practices as related to files. The Board ordinarily has two files of a given case: The formal file, which contains the record, pleadings, exceptions, and like material; the informal file, which contains the results of the investigation made in the field, the report of the regional director on the case, and any pertinent correspondence such as between union officials and the Board. For years the review attorneys had access to the informal files in order to ascertain the correctness of names, to check dates, perhaps to see when oral argument was requested, or to follow any settlement correspondence which might arise. As early as 1936 the Board refused review attorneys access to the informal reports of trial examiners until after the Board decision issued, but other material of an informal character was not included in the refusal.<sup>65</sup> This attempt by the Board to make certain that the findings would be based upon the record was amplified by instructions issued March 30, 1939, which prohibited the review attorney's having access to the informal file.<sup>66</sup>

<sup>63</sup> Appendix I, Section 10(c).

<sup>64</sup> Smith Hearings, Vol. II, No. 14, p. 561. There is some evidence to indicate that review attorneys and trial examiners have conferred on cases. See, for example, Smith Hearings, Vol. I, No. 18, p. 459 ff.

<sup>65</sup> Board Memorandum M-210. See Smith Hearings, Vol. I, No. 12, p. 432.

<sup>66</sup> Board Memorandum M-836. An exception was made for stipulation cases providing for a consent order. *Ibid.*

The implication of the review attorney's having access to the informal files is that the analysis of evidence, and hence the Board decision, may be based on material not in the record or that the review attorney might be swayed by material in the informal file. This does not follow, for mere access to an informal file does not mean that the Board would not or could not base the decision solely upon the record. Moreover, the Board regards itself as having complete control of the record until it is filed in the circuit court of appeals, and there would be small reason for the Board to rely upon the informal file for its decision when it can and often does reopen hearings in order to correct incomplete or unsatisfactory records.

From another viewpoint the restriction of access to the informal files is probably desirable in light of objections urged toward the two files maintained by the Board. Perhaps most vociferous of the critics was the AF of L, which argued that all the files of the Board should be open to all "interested" parties.<sup>67</sup> But if such openness is the alternative to prohibiting the review attorney's having access to the informal ones, then the latter is the better choice since in any event all decisions are made upon only the facts in the formal record and unions would not thereby be able to use Board information for organizing campaigns.

It was always the practice, prior to its abolition, for the review attorney to call upon the Economics Division for information of an economic character. If, for example, the review attorney found in the record certain industrial terms which required elucidation, he would request the Economics Division for information. This was clearly a desirable instance of the attorney's going outside the record, and no objection can be raised against such activity.

Prior to 1941, the review attorney attempted to finish his study of the case just prior to the oral argument. With his supervisor, he then listened to the argument as it was presented before the Board. Shortly after the oral argument, the review attorney and his supervisor came before the Board. The attorney orally presented from a written outline the issues in the case, a resumé of the testimony on each side, and a summary of the argument presented by the parties. Material bearing on the question of interstate commerce was included along with substantive issues. In

<sup>67</sup> S. Hearings on N.L.R.A., Part 4, p. 627.

relating the evidence, the attorney indicated what was uncontradicted; and if the evidence was contradictory, he related both presentations. The Board insisted that the attorney point out any differences between the trial examiner and himself on contested issues; and the point-by-point intermediate report carried weight since, as in all appellate tribunals, great reliance was placed upon the one who saw and heard the witnesses.<sup>68</sup> The attorney would indicate the immateriality of certain evidence if it was so palpable as not to be missed, and it is difficult to think that the attorney did not weigh the evidence and pass on its materiality and relevancy in some degree. The Board insisted that the task of the attorney was to digest and organize the evidence so that the members could obtain an organized view of what had been up to that time an unorganized proceeding with a multitude of divergent details. The members discussed the evidence and issues, they perhaps looked at exhibits, and they even referred to parts of the record. The review attorney and his supervisor were questioned and chiefly in that sense entered into the discussion. The review attorneys did not make any recommendations as to the decision unless asked, and then they gave their opinion; but their whole function was to present the digested transcript in terms of evidence. Where the Board was unable to reach a decision, it would request the attorney to review certain portions of the transcript and report again in conference. The attorney often wrote up certain difficult points for the use of the Board members and reported to the conference again so that the problems could be considered. The length of the conference depended upon the case under discussion, but most cases and records could be disposed of by the Board in no more than a few hours because of the ease with which evidence and records could be discussed by this flexible method.<sup>69</sup>

At the conference the Board decided each substantive issue and told the review attorney its decision. It also ordered the draft of a decision embodying the substance of findings on each

<sup>68</sup> Still, the Board placed great reliance on the record, for the Act is not self-enforcing and the court cases must stand on the record. In questions relating to the credibility of witnesses, however, the trial examiner is relied upon.

<sup>69</sup> For a statement by Chairman Madden on the operation of the review section, see his discussion before the Legal Institute of the American Bar Association, *Practice and Procedure Before Administrative Tribunals*, reproduced in Smith Hearings, Vol. I, No. 12, p. 440.

charge. The review attorney then, together with the supervisor, drafted a tentative decision in the language generally chosen. The tentative decision was then submitted to the Board members, who reviewed it both for language and substance. They might make changes in the draft, or they might reconsider the whole case; ordinarily only minor changes of language were necessary, and then the decision was again redrafted. The final draft, after approval by the legal division, was then inspected and signed by the Board members and issued as the responsible Board decision in the case.

If there is no intermediate report in a case, a draft decision based upon the record is drawn. This first draft will be put in the form of proposed findings of fact, proposed conclusions of law, and a proposed order based upon the findings. This form is served upon the parties, who may then file their exceptions and have their oral argument prior to the issuance of a "command" order. Whether an intermediate report or the proposed form is used in any particular case, the attempt of the Board to master and know what is in the record is complete and is fortified by ample deliberation. Moreover, there is little support for the criticism that the review attorneys render the substantive decisions of the Board.<sup>70</sup> The review attorney did attempt to present the evidence in such a fashion that the Board could see the case in its entirety; but when one remembers the internal checks set up, it is clear that the attorney could hardly promulgate the decision. The review attorney was checked by his supervisor before he ever appeared in conference, where the Board itself checked him; the intermediate report of the trial examiner was a check; and the oral argument of the parties before the Board constituted still another check.

In January, 1941, the Board reorganized the functions of the review division and its relation to the intermediate report. The intermediate report now goes directly to the Board members, who read the report themselves. The review attorney goes over the

<sup>70</sup> See, for example, Smith Hearings, Vol. I, Nos. 11, 12, and 13 especially, where the Smith Investigating Committee attempted to show that the review attorneys in practical effect determined Board decisions. It is true, of course, that attorneys used discretion and judgment on evidence, but the decision and responsibility for it rested with the Board. Even when determining credibility, the attorneys had to prove their judgment to the Board.

entire record, exhibits, intermediate report, exceptions, and briefs; and his analysis is to discover whether the intermediate report represents a fair and accurate statement of the facts as revealed by the record and a correct statement of applicable principles of law. This analysis is the basis of the attorney's written memorandum to the Board. The memorandum presents the issues, states whether the intermediate report reflects the facts accurately and applies the proper principles of law, and points up, with supporting reasons, points of agreement and disagreement between the conclusions of the trial examiner and those of the review attorney. The memorandum also points up where reasonable doubts as to the accuracy or soundness of conclusions might be raised, and evidence or considerations are summarized and presented in such instances. After the separate Board members have read the intermediate report, the exceptions, briefs, and the review attorney's memorandum, the Board meets with the review attorney and his supervisor, the trial examiner, and perhaps his law clerk. Issues and differences in conclusions are discussed and clarified. After the Board has made a decision, the review attorney prepares a draft decision incorporating the intermediate report with such changes and modifications as decided upon. Thus, the Board is endeavoring to improve the intermediate report, and the decision is basically the original decision made by the trial examiner. Whether this represents a better method for enabling the Board to judge a case is difficult to say. But the Board members *think* it does, and it is their responsibility to issue the decisions. In any event, the new routine may aid in improvement of the intermediate report; and improved intermediate reports mean more compliance and fewer cases.<sup>71</sup>

#### D. Procedural Strengths and Weaknesses

Despite the obvious necessity of the Board's having legal aid in reading the record and digesting the evidence, there was considerable criticism of the Board's procedure; and opponents of the Act and Board did not hesitate to base their court defenses upon procedural due process. Such defenses essentially alleged the ab-

<sup>71</sup> For an outline of these changes see H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, pp. 498-499, 526.

sence of a full and fair hearing as required under the traditions of due process, since no member of the Board had heard or seen the witnesses, and alleged that in *ex parte* proceedings the Board had consulted with subordinates upon whom reliance was placed to read the record, present the evidence, and draft the decisions. Based upon such allegations, employers would then call upon the Board to reply to interrogatories and submit to oral interrogation before a notary public with regard to the process by which they reached their conclusions and the participation by themselves and the review section. Although it is doubtful whether any other administrative agency has ever been subjected to such wholesale criticism and legal interrogation regarding the method whereby it arrived at its decision, and although the courts have almost uniformly supported the procedure set up by this agency, under the stimulus of court tests the Board retained and improved the meticulousness with which all cases go through to decision. It is true that the process is time-consuming, but there has been no choice for the Board. Hemmed in between the possibility of reversal if the meticulous care were to be forsaken and of judicial support if all steps were legally fortified, the Board had no real alternative to the meticulous proceeding.

The legal criticism against the review attorney apparently emanated in part from the first *Morgan* case. There it had been alleged that the Secretary of Agriculture had issued a rate order without having read or heard any of the evidence, and with no oral argument. While the Court held that such action justified an inquiry into the Secretary's action, it did not hold that the one who made the decision must have read all the evidence. On the contrary, the Court held that, while the one deciding must consider and appraise the evidence, reliance could be placed upon subordinates for help in analyzing the record and upon a summation of the evidence and that the requirements to satisfy due process were not technical ones.<sup>72</sup> When the appellate courts upheld the Board's use of the review section, they leaned upon the

<sup>72</sup> 298 U. S. 468 (1936). ". . . The one who decides must hear.

"This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants. . . . Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense."

first *Morgan* decision for support, as did the Board when it defended in the courts its use of the section.

The use of the review attorney was upheld by the circuit courts in the *Inland Steel* case, the case of *Cupples Company Manufacturers*, and the *Biles-Coleman Lumber Company* case.<sup>73</sup> In certain other cases the Board opposed interrogatories requested by the respondent in an attempt to show that the Board insufficiently considered the evidence and that in effect the review attorney rendered the decision: *Botany Worsted Mills; Lane Cotton Mills; Ford Motor Co.; and Louisville Refining Co.*<sup>74</sup>

The procedure used in unfair labor practice cases is impressive for its thoroughness. The present system was rooted in the first National Labor Relations Board, of which Judge Calvert Magruder, later of the Circuit Court of Appeals for the first circuit,

<sup>73</sup> Respectively, 105 F. (2d) 246, CCA-7; 103 F. (2d) 953, CCA-8; 98 F. (2d) 16, CCA-9. Also see Smith Hearings, Vol. I, No. 12, pp. 438-440.

<sup>74</sup> Respectively, 106 F. (2d) 263, CCA-3; 108 F. (2d) 568, CCA-5; 99 F. (2d) 1003, CCA-6; 102 F. (2d) 678, CCA-6, certiorari denied by the Supreme Court, 60 S. Ct. 81. Also *Ibid.*

The courts sometimes spoke with candor in upholding the Board's procedure. In the *Botany Worsted Mills* case, 106 F. (2d) 263, the court said:

"When one comes to consider the record itself and the conclusions which the Labor Board deduces therefrom, one wonders at the insistent desire of counsel to inquire into the methods whereby those conclusions were reached. In view of what appears to be their conception of the judicial practice, we are somewhat nervous about stating that we have read the record. That does happen to be the case and we may say that our reading gives us an impression of the faithful performance of duty by the members of the Board."

The sole case in which the Board suffered reversal was the *Cherry Cotton Mills* case, (98 F. (2d) 444, CCA-5) and it was a case where no intermediate report issued nor were there a proposed finding and order. The Board's objections to interrogatories were overruled, but the court later granted a motion by the Board to dismiss without prejudice so that it might reopen proceedings, as in the *Republic Steel* and *Ford* cases, following the second *Morgan* decision and the institution of the proposed finding and order.

Cases are reopened by the Board in the event the parties apply or the Board itself or the chief trial examiner discovers procedural error.

Rehearings are not provided for in the rules and regulations; but as of October 22, 1939, 208 petitions for rehearing had been entertained by the Board out of 1950 cases decided. The Board granted 24 petitions, denied 153, and the balance were pending. In 22 of the 24 where rehearing was granted, the Board modified its original decision; that is to say, in over 91 per cent of the rehearings, there presumably existed evidence that changed the decision. The Board's approach is that for a rehearing to be granted there must be a clear showing that evidence which exists was unavailable at the time of hearing; and since this is difficult to do, rehearings have been granted mostly because the Board was uncertain of its own position and granted a rehearing in order to consider further argument on disputed points. The desire of the Board to secure fairness is thus demonstrated. Monograph No. 18, pp. 71-78.

was general counsel. Between the date when the N.I.R.A. was declared unconstitutional, which really abolished the first National Labor Relations Board, and the date when the present Board was first created in August, 1935, the organization of the first Board was kept intact even though it did not actively function. The personnel knew the statutory provisions of the Wagner Act, and most of the time was spent in that interval drawing up an organization and a scheme of procedure designed to assure court approval of the anticipated public policy and to promote compliance. Some of the mechanics were uniquely developed, but the group drew heavily upon the experience and organization of other agencies. The trial examining and review sections, for example, were in large part patterned after similar sections in other agencies. It was necessary, of course, for the Board to vary the processes of other agencies to fit their own in light of different basic matters under control.<sup>75</sup>

During the first six years, the procedure at no time approached perfection. Improvements were made continually, and the Board members and higher officials devoted much effort to improvement; but despite all its internal checks the Board still committed errors. The chief distinction and the outstanding advantage of the established procedure are that, when the Board has been subjected to the courts in enforcement proceedings, the record in the case has been a reliable one and one which, as demonstrated by the Board's legal victories, justified the meticulous care used. While chairman of the Board, Mr. Madden said:

" . . . We think we are not exercising too much care in having these various reviews of the record and I might say . . . that at least two judges of the Supreme Court, who are the older judges, have said that our work as it comes before the Supreme Court is the best that comes from any Department of the Government."<sup>76</sup>

Against the advantage of judicial support must be placed the time necessary in the Board's procedure, which is an important consideration in the field of labor relations since a recalcitrant employer may, in the time during which the case is moving through its various stages, destroy the union. This partially ex-

<sup>75</sup> Smith Hearings, Vol. II, No. 14, p. 562.

<sup>76</sup> H. Hearings, F.S.A. Appropriation Bill for 1941, 76th Congress, 3rd Session, Part I, p. 612.

plains why, despite extensive deliberation and a series of internal checks, there has been such acrid criticism directed by all parties toward the Board when one might otherwise expect praise for its painstaking methods. Five months elapsed in the median unfair labor practice case from the close of the hearing to the issuance of the decision.<sup>77</sup> Of this period, 50 days were used from the hearing to the intermediate report; 30 days from the intermediate report to the exceptions; 20 days from the exceptions to the oral argument; and 55 days from oral argument to decision. The only limiting factor in the time schedule was the rules requirement that the parties must file exceptions to the intermediate report within twenty days, although the Board might permit time for a brief to be filed. Otherwise the time necessary for a decision was a matter of Board mechanics.

A part of the criticism attaching to Board procedure was based in the repetition involved in the post-hearing procedure. "Meticulous care" demanded that the parties be heard by one trial examiner, who was checked by another; the reports of those two were checked by a review attorney, who was in turn checked by a supervisor, neither of whom had any confidence in the trial examiners. The attitude of the review section toward the trial examiners was fortified by the reliance placed by the Board upon the review attorney as contrasted with the trial examiner, by a failure of the Board to agree with the findings of the trial examiner in one case out of every four where the employer did not comply with the intermediate report, and by a wholesale refusal by the employers to comply with the intermediate report. This posed the question as to why the Board should have such duplication and brought many different recommendations with regard to the post-hearing process. The Board itself was always concerned with the post-hearing routing of the case and gave considerable thought to telescoping the functions of the trial examiner and review attorney. Even in 1940 the Board still relied chiefly upon the review attorney's presentation of the case rather than upon the intermediate report except where there were questions of credibility, although the Board members knew the contents of the intermediate report through the review attorney. This confi-

<sup>77</sup> The figure, and the ones following, are for 1938-1939 and are reproduced from Appendix A, Monograph No. 18, p. 90.

dence in the review attorney sprang from the fact that the trial examiners had such a heavy burden in hearing cases that they had inadequate opportunity to read the transcript and write a report that commanded confidence. The review system set up within the trial examining division led to improvement in the intermediate report, but even there delay occurred due to inadequate personnel. This delay was also characteristic of the next stage where the review attorneys have for long had a heavy backlog.

Following the idea that duplication could be reduced if the functions of the trial examiner and review attorney were to be telescoped, the Board experimented with the objective of reducing the time between the close of the hearing and the issuance of the decision. In one case, the record went to the review attorney at the same time that the trial examiner began to prepare the intermediate report, and both progressed through the record at somewhat the same speed.<sup>78</sup> When each concluded his study, the two conferred before the intermediate report was issued. At their conference the two discussed the theory of the case, the trial examiner's conclusions, and the issues, and especially considered the differing conclusions as to what the record showed. The intermediate report then issued over the signature of the trial examiner and approved by the review attorney.

If such a telescoping of functions were to work, it would operate to reduce the exceptions which would be taken to the intermediate report, for the review attorney is powerless except perhaps to review the exceptions and the record pertaining to them. He must wait for the Board to decide. But any case which would be strengthened so that fewer exceptions would be taken would mean an improvement in the procedure. This experiment, while not unsuccessful, was not continued as a permanent device for two reasons: First, the general counsel of the Board, attentive to judicial considerations, believed as a general principle that the review section must be separate and in no way related to the other divisions, so the experiment was objectionable upon principle.<sup>79</sup> Second, since the review attorneys at the time of the experi-

<sup>78</sup> Smith Hearings, Vol. III, No. 18, pp. 674 ff.

<sup>79</sup> Under this system the intermediate report would serve as an outline for the Board order. So long as the trial examiner is responsible for the inclusion and exclusion of facts and for the intermediate report, it may be better to keep separate the review attorney and trial examiner to secure objectivity by each.

ment in late 1939 were very heavily burdened with a backlog of cases, their use on current cases would have prevented a reduction of the backlog; hence as a matter of practical mechanics of operation the experiment could not be made a part of the regular procedure, although the Board did not foreclose the adoption of the experiment as a regular part of the system at a later date when the backlog had been reduced.

Congressman Halleck suggested that the law be changed so that, in the absence of exceptions, the intermediate report would become the decision of the Board, as is the procedure in some other agencies such as the I.C.C.<sup>80</sup> It is to be noted, however, that the report does become the Board decision in a practical manner, although not technically so. If there is no exception taken to the report and if there is compliance, the case is closed on that basis; it follows that the respondent, who is usually the one who excepts, does accept the intermediate report. If no violation is found and there is no exception, the case is considered closed; and this again may be said to be acceptance of the report. Only where exceptions are taken are there departures from the report. Under the Halleck proposal there would be the right of appeal through exceptions, as now, so from the angle of accepting the report the proposal is in virtual operation.

Mr. Halleck went somewhat further, however, and also proposed that the trial examiner, immediately at the close of a hearing, render his findings and recommendations before the short-hand notes of the hearing were transcribed. It would be provided that if either party then desired to appeal the case the appellant would have to pay for the printing of the record, and it was thought that such an economic lever would reduce the number of exceptions. There would be two difficulties attached to such a procedure: First, the trial examiners are often confronted with cases involving discrimination against hundreds of persons, or similar matters, that render a case extremely complex. The trial examiner is simply unable to reconstruct the case in its entirety without a typed record of the testimony, and it is probable that only in the smaller cases would the examiner be able to

<sup>80</sup> Presumably it would be necessary to change the law, for the Act requires the Board to find the facts and render a decision. The Board might state in its decision that the facts found in the intermediate report were the facts found by it, but this would be questionable. Smith Hearings, Vol. II, No. 4, pp. 124-127.

render a finding at the conclusion of the testimony. Second, and of prime importance in light of the implications, the use of the proposed economic lever runs counter to the development of the administrative process. In part, the administrative process developed as an answer to the high costs of litigation facing the persons and groups small in economic significance. To assess what in effect would be litigation costs would be a departure from demonstrated advances as well as reprehensible from the view that such a change would tend to put justice on an economic basis.<sup>81</sup>

Both Chairman Madden and the chief trial examiner, while differing on details, favored more Board dependence upon the trial examiner and intermediate report.<sup>82</sup> Broadly, both desired a system which would continue to use the higher type employees to obtain the testimony; but both thought it would be well for the trial examiner, who saw and heard the witnesses, to come to Washington directly at the close of the hearing. With ample time to sift and analyze, the examiner could write his intermediate report; and the review attorney would function as a kind of judicial secretary to the trial examiner and the Board. The trial examiner then would have his report reviewed within the trial examining division. Then the trial examiner who heard and the one who reviewed would go before the Board and themselves present the findings. Later they would draft the decision after conference with the Board. Under this system, the Board would still keep some of the review attorneys to act as judicial secretaries and thus give some check for the Board against the trial examiner.

In its essential outlines, as has been indicated above, this system was incorporated into the Board's internal organization by early 1941. The trial examiner does present his findings to the Board; the number of review attorneys and their importance

<sup>81</sup> Even if appeal be provided for in the acceptance of a system whereby the intermediate report would become the Board's decision, there would still be danger that the application of the law to a given set of facts would be the trial examiner's, not the Board's. An intermediate report's recommendations are in a sense setting precedents and establishing doctrine, presumably emanating from the agency; and as a matter of channelizing such doctrine, the intermediate report should always be checked by the agency, apart from the question whether or not there are exceptions. This point was made by Lloyd Garrison, Smith Hearings, Vol. II, No. 13, p. 506.

<sup>82</sup> Smith Hearings, Vol. II, No. 14, p. 563.

have been reduced, but the attorney still functions to review the record and act as a judicial secretary to the Board; and the focus on the intermediate report as the basis for the Board's decision has been intensified. Review within the trial examiners division has been supplanted by the institution of attorneys to aid the trial examiners. Reorganization in internal procedure came slowly because the Board had to develop, with restricted financial resources, competent trial examiners, so that a good intermediate report *could* be written by trial examiners who *could* hold a hearing and read a record properly. By 1940 the trial examiners were functioning with competency, reduced congressional appropriations required changes in internal procedure, and the use of attorneys to hold hearings in most representation cases released trial examiners to hear complaint cases. Thus, the improvement in the intermediate report, which has been sought since 1937, was by 1941 a reality.

There is nothing in the Act which prevents the adoption of such internal procedure as the Board desires. Internal procedure is not a matter of legality nor of speed but rather is a matter of how the Board members *think* they can best operate in order to accomplish their task.

## Chapter XV. PROCEDURE IN REPRESENTATION CASES

Section 10(b) of the Act empowers "the Board, or any agent or agency designated by the Board for such purposes," to prosecute violations of those provisions of the Act designed to prevent unfair labor practices. Section 9(b), however, says that "the Board shall decide . . . the unit appropriate," and Section 9(c) provides that "Whenever a question affecting commerce arises concerning the representation of employees, *the Board may* investigate. . . . In any such investigation, *the Board* shall provide for an appropriate hearing . . . and may take a secret ballot . . . or utilize any other suitable method. . . ."<sup>1</sup> It is clear that the wording of the Act provides that in the one kind of proceeding the *Board* shall take the action, that in the other the *Board or its agents* may take the action. There is also a distinction in the type of proceeding: the unfair labor practice cases are clearly adversary proceedings and are so handled, while the representation proceedings are purely investigatory and fact-finding. No command orders issue from a representation proceeding. Nevertheless, the Board set up a proceeding that, throughout the major portion of its first five years' existence, treated both proceedings in the same legalistic and judicial manner. In each case the proceeding was designed to incorporate within the record the evidence upon which the finding of the Board may be based. In a broad sense, complaint cases and representation cases had similar procedure for the purpose of obtaining the record, and this was a matter of Board choice since the Act outlines but slightly the framework for representation proceedings in contrast with the outline for complaint cases.

<sup>1</sup> Appendix I. Italics supplied.

### A. The Petition

In representation cases the Board machinery begins to operate only when a petition is filed by an employee, a person, a labor organization acting for the employees, or an employer. Presumably the Board may proceed on its own motion in any case, since the Act states that the Board "may" investigate "whenever" a question concerning commerce arises.<sup>2</sup> As a matter of policy the Board never participated in representation proceedings unless it was petitioned to do so. This was a conservative course to follow because there would always be a labor organization willing to petition and present a question whenever it thought it had even a slight chance of qualifying for certification.

The policy may have been subject to some criticism prior to the Board's permitting the employer to file a petition, for it was argued that the employer might be caught between two contesting unions, neither of which would petition the Board to enter a controversy, and the employer would suffer. This refusal of the Board to permit employer petitions was followed until July 14, 1939, and in the face of pressing criticism of being "unfair" the Board on that date revised its rules and regulations. The Act did not prevent employer petitions; it was a matter of Board discretion. The Board had feared that the privilege of employer petitions would mean that an employer would use the Board machinery to prevent the growth of a labor organization by requesting a certification when he would know that the incipient organization had no majority.<sup>3</sup> In any event the Board had not, despite such an appearance to the layman, forsaken the employer. In practice, the Board received "informal" petitions from employers whenever competing unions endangered the employer's business. The employer would notify the Board of his position, and the Board would in turn seek to have the union bring a petition,

<sup>2</sup> Appendix I, Section 9(c). Rules and Regulations, Series 2, Article III, Section 10(b), so provide.

<sup>3</sup> Moreover, the Board's attitude was that the employer had no interest in the employee's choice as to representatives and indeed had no obligation to bargain if he did not in *good faith* know who the representatives of his employees were. It was then incumbent upon the employees to show, by Board certification if necessary, a representative for the majority. Board experience demonstrated that it was rare indeed for there to be competing unions and for at least one of them not to petition. S. Hearings on N.L.R.A., Part 3, pp. 540-543.

which it would do; or the employer himself would confer with one of the unions and have it bring a petition to the Board. The Board's change of rules and regulations did, however, somewhat mollify public criticism, although the change was fortified with ample safeguards so that the machinery of the Board could not be used to the disadvantage of a growing labor organization. Still a matter of its own discretion, the Board provided in its rules and regulations that it shall not "direct an investigation on a petition unless it appears to the Board that two or more labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the bargaining unit or units claimed to be appropriate."<sup>4</sup> The discretion with which the Board protects itself in the case of employer petitions is really no different from that used in employee petitions, for in both instances Board action is a matter of Board discretion in view of circumstances. As a qualifying consideration for Board action, there must be no taint of employer assistance or support.

After the Board changed its rules, employers began to file petitions, which were handled as indicated below.<sup>5</sup>

**DISPOSITION OF EMPLOYER PETITIONS,  
JULY 14, 1939–FEBRUARY 1, 1940**

Number of petitions filed	52
Number of petitions disposed of	23
By consent election	5
By recognition of one union	1
By dismissal	10
By withdrawal	6
By transfer from one regional office to another	1
Number of petitions pending February 1, 1940	29

As of February 6, 1940, there was but one directed election,<sup>6</sup> because when an employer files a petition it is almost always followed by a petition from one of the competing unions and the Board proceeds on the union's petition rather than on that of the employer. The same result is reached in either event, and the Board has found that the employer is pleased to be free of the case once it is en route to determination.<sup>7</sup>

<sup>4</sup> Rules and Regulations, Series 2, Article III, Section 3.

<sup>5</sup> N.L.R.B. Press Release R-2702. As of October 8, 1941, employers had filed a total of 214 petitions.

<sup>6</sup> Smith Hearings, Vol. II, No. 16, p. 650.

<sup>7</sup> H. Hearings, F.S.A. Appropriation Bill for 1941, 76th Congress, 3rd Session, Part I, p. 548.

The petition itself must be a notarized statement, which is filed with the regional director in the region, or regions in the event the bargaining unit covers more than one region, and which sets forth the facts pertaining to jurisdiction, the bargaining unit claimed appropriate, the number or percentage of employees the petitioner claims to represent the organizations involved, and other relevant information.<sup>8</sup> The objective of the petition is to obtain certification as the collective bargaining agent for all employees in the unit selected by the Board, and its immediate effect is to start an investigation by a field examiner.

The investigation is similar to investigation in unfair labor practice cases except that it is likely to be less difficult. The investigator is primarily interested in the facts to support jurisdiction, the number or proportion of employees desiring certification, the organizations involved, and the claims made by the employees through organizations as to what shall constitute the bargaining unit. Conferences with the employer may be held; and the union may be requested to bring in membership cards, or union books, for the investigator to check.

### B. Informal Disposition of Petitions

If the field examiner and regional director are convinced that the unit contention has no validity, or if they have reason to believe that the petitioner has insufficient support to be designated as the collective bargaining representative, the regional director will endeavor to forestall further proceedings by requesting the withdrawal of the petition, which can be accomplished by the petitioner's requesting the Board to permit the withdrawal and a Board order so doing. If the petitioner will not withdraw the petition, then the regional director will recommend to the Board that the petition be dismissed, and the Board issues an order to that effect. This procedure in the handling of withdrawals and dismissals is based on the language of the Act, which, under a legalistic interpretation, must be handled by the Board itself and

<sup>8</sup> Upon request, the Board may permit petitions to be filed with it directly. Only 23 petitions were so filed between the creation of the Board and January 1, 1940. Monograph No. 18, p. 76, and Rules and Regulations, Series 2, Article III, Section 10(a). The Board will permit cases to be filed with it where a nationwide enterprise is involved, such as in the *Postal-Telegraph Co.* case.

not its agents. In fact, the internal procedure of the Board leaves with the office of the secretary the approval of withdrawal and dismissal orders, and the case is rare that a withdrawal or dismissal is not ordered when requested. This legalistic "red tape" led the Attorney General's Committee to criticize the agency's labor of a perfunctory character and to suggest that the regional director be extended sufficient power to permit withdrawal or order dismissal on the scene without the necessity of going through Washington.<sup>9</sup>

If it appears to the regional director that the petitioner has a probable case, informal efforts are made to adjust or settle the representation question to the satisfaction of the petitioner. This can not always be accomplished in the CIO-AF of L representation controversy, but in others informal settlements are often successful. The membership cards brought in may be checked against the employer's payroll and resolve all doubt; or in conference the employer may be convinced by the union that it possesses a majority, and the presence of the Board representative may lead to employer acquiescence and recognition of the union. One of the most important informal settlements at this stage, however, is the consent election, which, it should be noted, does not provide certification but does dispense with the issues. This election is informally agreed to by the parties under the condition that the regional director shall hold the election, whereupon the director, without referring the case to Washington and without any formal hearing, has ballots printed, organizes the election machinery out of his office, and holds the election. He counts the ballots and informs the parties as to the outcome, and the employer proceeds to deal with the union which has a majority. The Board never formally enters the case and never certifies any union as a representative because the policy is that a certification must be based on a formal hearing.

### C. Investigation and Hearing

If the regional director fails to obtain an informal settlement of the case and if the preliminary investigation has disclosed that a dismissal or withdrawal would not be justified, the director re-

<sup>9</sup> Monograph No. 18, pp. 79-80.

quests the Board to issue an order of investigation and hearing, which is the representation counterpart of the authorization to issue a complaint in unfair labor practice cases. Whereas complaints are issued in unfair labor practice cases by the regional director, the Board itself, upon request from the regional director, issues the order for investigation and hearing in representation cases. This is again the legal construction of the Act by the Board; its position is that it may not delegate its function in representation proceedings. As in dismissals and withdrawals, however, the secretary's office actually issues the orders for the investigation. In any event it could not be seriously maintained that Congress meant for the Board itself to order and to investigate every representation proceeding.<sup>10</sup> The significance of such legal interpretation and action based thereon is that it is partly responsible for the highly centralized Board machinery, which required more time than would be necessary to handle if more judgment were to be entrusted to the regional directors. And although the Board follows almost completely the recommendations of the regional directors and although requests for orders of investigation and hearing are handled in Washington very rapidly, still there is time involved. Time is important in unfair labor practice cases, but it is perhaps even more important in representation cases.

The Board sometimes consolidates complaint cases and representation cases in order to expedite the settlement of related issues. The Board uniformly held that where a question of representation and a question of unfair labor practices were both at issue, the representation question would be settled second in order to secure independence in the choice of representatives. There then grew up certain abuses of the Board's procedure on the part of the labor organizations, abuses which were engaged in until 1939 when they began to taper off as the conflict between the CIO and AF of L lost some of its spectacularity. If, for example, the AF of L affiliate were to petition the Board to certify it as the bargaining representative and if the CIO at the time had no majority or only the nucleus of an organization, the CIO might go to the employer and demand that he bargain with that organization as exclusive representative. The employer would have to

<sup>10</sup> Monograph No. 18, pp. 79-80.

refuse since the AF of L claimed a majority and had asked the Board to certify it as bargaining representative. The employer's refusal would cause the CIO union immediately to file a charge against the employer for refusing to bargain, for company domination, or for interference. Since the Board's uniform policy was not to certify so long as a violation of the Act remained unsettled, certification proceedings would be withheld until the complaint case was settled; and by then the CIO would endeavor to have sufficient membership to prevent the AF of L's being certified and instead be certified itself. Sometimes the Board was successful in getting the complaint case withdrawn or settled, but whenever one of the unions was weak it was unlikely that the Board would be successful in such an attempt. The alternative was to resolve the complaint case for which, if it appeared after preliminary investigation of the charges that there were sufficient grounds for complaint, a complaint would be issued; and the representation proceeding would be held in abeyance.<sup>11</sup>

<sup>11</sup> It also occurs that the union which files the petition also files charges alleging interference or a refusal to bargain before the petition is acted upon. This raises a difficult problem. If the union petitions for certification, the employer may attempt to destroy the union; and that activity would lead to a charge of refusal to bargain, or interference and restraint. The Board must not permit the violations of the employer to deprive the union of its majority status at the time the petition was filed, for the employer's refusal to bargain and his attempts to destroy the union might mean that the employer would avoid the obligations of the Act by one violation to support another. In legal contemplation the employer is required to bargain whenever there is a majority, and the absence of a certification is no relief. Chairman Madden believed that a petition could be viewed as a temporary waiver by the union of the right to bargain in the absence of other employer misconduct, yet Mr. Madden admitted the inconsistency apparent when a union petitions for certification and follows with a charge of refusal to bargain. But to refuse the filing of a charge might open the door to demonstrated attempts by employers to destroy the union after it files a petition. Such action would clearly support interference and refusal-to-bargain charges, yet it might be argued that the union is estopped from bringing charges if it has already petitioned for certification. The Board, therefore, ordinarily receives charges of interference and refusal to bargain, but there must be support for an interference charge in order to support a refusal-to-bargain charge. This really constitutes deference to the employer in that he may be acting in good faith in refusing to bargain if he is not sure there is a majority represented by the union, but the existence of facts to support an interference charge permits the employer no longer to refuse to bargain.

Where there have been two unions involved with each claiming the right to represent employees, and refusal-to-bargain charges have followed the petitions, the Board has not proceeded on the charges so long as the employer has left the organizations alone. The Board approach is that if the employer does not in good faith know with which organization to bargain, he is under no obligation to do so. In practice, the Board discourages the filing of a refusal-to-bargain charge, and if

The Board's policy led it into difficult positions as a result of the unions' abuse. Because of the long time period demanded by complaint cases, the representation status of the union would disappear because of the weakening of the union, unit changes, or industrial changes. This was, of course, exactly the result sought by the union organization opposing another organization. The only respite the Board received was when some union, while refusing withdrawal or opposing dismissal, would agree to go ahead with the election despite the complaint it filed; that is, the union agreed that the unfair practice it complained of should not constitute a basis for the invalidation of the election, but this was a rare occurrence where the CIO and AF of L were involved.

To meet this union abuse, in the latter part of 1939 the Board finally developed machinery for avoiding the unfortunate results accruing to the union which had filed the representation petition; and the machinery permitted the original Board policy to be followed. Rather than consolidate the two cases, the Board handled the complaint case first, as before; but the representation case was dismissed or withdrawn *without prejudice*. As quickly as the complaint case was completed by the Board, the party who filed the representation case could again present a petition; and a representation proceeding was begun if the party still so desired.<sup>12</sup>

It was thought that this small change in procedure would be extremely useful. It would enable the segregation of complaint and representation issues and permit complaint cases to move through more quickly to a decision; there would be less opportunity for the unit claimed appropriate, or the majority, to change if the time element were reduced for the related complaint case; or even if conditions did change or even if the complaint case decision were to affect the representation proceeding, the Board would have one less proceeding to handle. Where the Board had

the charge is filed the Board does not proceed with the complaint unless at the hearing the union can prove conclusively that it did have a majority. This is in effect a "good faith" rule for the employer. Smith Hearings, Vol. II, No. 12, pp. 413-414. The unions may file charges of company domination. Such charges can not be handled as can refusal-to-bargain charges, and no "good faith" problem is involved. There is nothing for the Board to do but investigate.

<sup>12</sup> Cases are still consolidated where two or more *petitions* are filed by the employees under the same employer and the unit question is involved. This permits the consideration of what is essentially but a single case.

been unable to reach a settlement, it might be better able to do so after it had resolved the complaint case. If the employer had refused to bargain and that was the basis of the complaint case, then the Board would have dealt with the unit question in reaching its decision; and that information and material would be transferable to the new representation proceeding.

This change was important partly because it was an offset to the general delay picture portrayed by labor organizations. It is true that in some of the cases where a complaint case was filed upon a representation case, the complaint proceeding took such a long time that the Board, when it reached the representation case, simply dismissed it because of the time element involved, although this was rare and has been overemphasized by the severest critics of the Board. It is also true that delay was involved whenever a complaint case was filed upon a representation case, but it must be pointed out that not all such action was brought by one union to stifle another. Some of the occurrences were bona fide, although probably far too many were for the purpose of union competition. It is to be remembered that the Board has clearly shown that, as between the AF of L and the CIO, there has been no monopoly of abuse and that the two organizations are fairly equal in the use of the practice; that the presence of unfair labor practices is always prohibited, and the fact that a petition has been filed does not relieve the Board of its responsibility to prevent such unfair practices; and there can not be free choice of representatives so long as there is a possibility that there have been unfair labor practices.<sup>13</sup> The Board really has no choice but to proceed when a complaint case is filed, even if following a petition, for bad faith is not necessarily involved and it is a proper procedure for the unions to follow. Here again the Board has been put in an unfavorable light, in part because of the antagonism of the two leading labor organizations. While still chairman, Mr. Madden found fewer instances of this occurring after 1939, although it was not readily apparent whether the decrease was attributable to less bad faith by the organizations or fewer violations of the Act by employers.

<sup>13</sup> S. Hearings on N.L.R.A., Part 15, pp. 2751 ff. The AF of L has been the severest critic on delay, and that organization denounced the Board for permitting the CIO to file charges after the AF of L had petitioned for certification.

Both the AF of L and CIO have been cognizant of the unaffiliated or independent unions. Not all union organizations desire to be affiliated with either of the two national organizations, yet desire to have all the attributes attaching to an independent organization, including certification as the bargaining representative. This led to the same type of practice as indicated above: When an independent union filed a petition for certification, one of the national organizations would counter with a charge of company domination and thereby prevent the certification of the independent, while the national organization would endeavor to organize those belonging to the independent.

The regional director, upon receiving the Board's direction to undertake a formal investigation with notice and hearing, determines the date, the place, and the time at which the hearing is to be held and so notifies the parties. The parties include the petitioner, the employer, and any other known individuals or organizations thought likely to have an interest in the outcome of the proceedings.<sup>14</sup> There may be intervention, which is handled identically as under complaint procedure, as are all motions, witnesses, and subpoenas.<sup>15</sup> Intervention is probable where organizations differ on the unit claimed to be appropriate, such as the craft v. plant unit difference, although intervention is denied where there is no unit question and the intervener applicant can present no sufficient evidence to indicate that a contest really is at issue as to who shall represent the majority.<sup>16</sup> Prior to the hearing itself, matters such as motions are directed to the regional di-

<sup>14</sup> The Railway Labor Act contemplates no employee petition, and the employer is never made a party by the National Mediation Board. While the Board takes the position that the employer is not a party in legal contemplation, it believes that any additional time added to the hearing is compensated for by the fact that there will be no issue brought to the effect that a question concerning the employer was determined in his absence. Monograph No. 18, p. 83. The Board's Rules and Regulations, Article III, Section 3, provide that all persons notified become parties.

<sup>15</sup> Article III, Section 4. There are no pleadings provided since the Board makes no assertions as to the truth of the facts stated in the petition, a copy of which goes with the notice and states the issues. In legal theory, the notice merely provides for a hearing to ascertain the accuracy of the facts. Monograph No. 18, p. 84.

<sup>16</sup> The report of the Attorney General's Committee points out how unions still at the beginning of 1940 were intervening in order to harass rivals through motions for continuances, objections, examination and cross-examination designed to hinder the union. Since the hearing is for the purpose of exploring the interest of all parties, the Board is helpless. This is again a demonstration of union abuse of Board procedure. Monograph No. 18, p. 85.

rector and thereafter to the trial examiner or attorney presiding or to the Board itself. But a request for withdrawal or a motion to dismiss after the hearing is under way must go to the Board, which must issue an order; the trial examiner or attorney is powerless in this respect.

Since the hearing in a representation case is not an adversary proceeding but is only to establish the accuracy of stated facts, the position of the Board is different from that in complaint proceedings. Prior to May 27, 1940, the trial attorney appeared before the trial examiner, who was designated by the chief trial examiner upon request from the regional director much as in complaint cases; and the trial attorney presented the facts as pertaining to jurisdiction.<sup>17</sup> He then ceased participation in the case. If he again participated in the case it was only to supplement the record with certain facts in order to facilitate a decision, but he was in no sense an advocate. Primarily, the parties thereafter endeavored to develop for the record facts which would pertain to the number of employees, the nature of the employees' work, the background of collective bargaining and its relationship to the unit considered appropriate, the common interests existing or not existing between and among employees, the number of employees enrolled as members in the labor organization, or the authority for the union to act as bargaining representative. In the development of such facts, there would seldom be an instance where the trial examiner would have to pass upon the credibility of witnesses, although in a few important cases an experienced trial examiner was undoubtedly an influence making for order in a hearing where two powerful labor organizations were involved. Not being an adversary proceeding, there was not even an intermediate report from the trial examiner since his judgment on witnesses was not of importance. The Board received an informal report from the examiner on the proceedings, and this informal report had a varying history so far as concerned its importance. Certainly the informal report was not indispensable because the trial examiner happened to write it, and it never played a major role in the determination of the unit and majority questions.

Despite disclaimers that the representation cases were not ad-

<sup>17</sup> Usually today the facts to establish Board jurisdiction are stipulated.

versary proceedings, the Board actually made them so in everything but label. In part, the Board may have patterned the representation procedure after complaint procedure because of an unawareness of the effects of certain administrative techniques. Until the *Cudahy* case in 1939,<sup>18</sup> the Board relied upon the presentation of union cards, checked against payroll books, as evidence of a majority designation of a bargaining representative. Sometimes the employees, in order to be safe, would sign authorization cards with both of two competing organizations; and this led to difficulty. After the *Cudahy* case the Board relied almost exclusively upon the election, with the exception of dues cards or membership cards so presented as to offer convincing proof of a majority position. What is important to note is that until that time the Board had relied heavily upon the unions for evidence of a majority position, deaf to employers' protests that an election should be held to ascertain whether the union had a majority. The demonstrated Board faith in unions antagonized employers in a great many instances so that the employer would refuse to stipulate any information whatever, and the whole long process of hearing would be necessary, with all the facts to be developed for the record. In short, the confidence placed, and often misplaced, by the Board in the unions had the effect of provoking an absence of cooperation by the employer; and hence the full-blown hearing perhaps had some need of a trial examiner, though at most it could not have been great. After the *Cudahy* case the administrative technique was changed; employers knew that there would be an election held, and they were asked to stipulate certain factual data *in order to conduct* an election. This approach was an altogether different one; and employers were more willing to stipulate almost all the facts desired, so that the hearing became much simpler than formerly. It followed that there was even less need than before for the trial examiner, since the proceeding was not so adversary in character.

Despite the success of the changed approach which followed the use of the election, the Board continued to make use of trial examiners until May, 1940. The legal division of the Board always opposed suggestions that the trial examiners not be used in representation proceedings. Such suggestions favored the con-

<sup>18</sup> 13 N.L.R.B. 526.

servation of trial examiners for complaint cases because the shortage of their numbers was often severe. This legal belief in the efficacy of trial examiners persisted throughout the most trying period when unions pleaded for Board action and hearings on complaints, and not until the Congress seriously reduced the appropriation for the Board in 1940 was this changed.<sup>19</sup>

Following the reduction in appropriations, the Board drew up a procedure to eliminate the need of a trial examiner at representation case hearings. The new system uses a staff trial examiner in only those cases that appear to be the more difficult and controversial ones, and in such event the regional director notifies the chief trial examiner and requests a hearing date. The chief trial examiner furnishes the date and designates the examiner as in a complaint case. In all other cases, persons attached to the field offices are to be designated by the regional director, who also sets the date of the hearing without clearing through Washington. The person chosen to moderate the hearing is an attorney if possible, otherwise a field examiner. In the ordinary run of representation cases the Board would have but one representative, and no attorney would appear for the Board except to act as trial examiner. The person so acting would be responsible for having all relevant facts introduced into the record, including first of all the material or stipulations relating to the Board's jurisdiction. In the event the case is of such nature that it must be heard by a staff trial examiner, the Board continues to have an attorney appear. During the hearing the parties make the same effort to incorporate the material in the record as to facts as they did prior to the change.

At the conclusion of the hearing, the person who presided immediately wires the Board that the hearing has closed and forwards a short recommendation to the chief trial examiner as to the disposition of the case. The recommendation must be brief but must indicate the nature of the problems involved: The unit question; *Globe* doctrine; contract question; CIO v. AF of L; jurisdiction; pleading or procedural questions; fact stipulations; attitude of employer toward Board certification and union recog-

<sup>19</sup> The Board reduced the number of trial examiners by ten. Representation cases are seldom as long as complaint cases, but the alternative use for the trial examiner is pressing.

nition; attitude of all parties toward an election.<sup>20</sup> The chief trial examiner does not care for the opinion of the person who heard the case but does desire quick information as to the nature of that case. The regional director forwards the record of the hearing to the Board, which orders the case transferred to it upon completion of the hearing.

#### D. The Certification

The record of a representation case goes to the review section, where the process is similar to that of complaint cases in that the Board depends upon the record; and the review section ascertains what the evidence indicates. The rules and regulations provide that the Board may grant oral argument or requests for filing briefs.<sup>21</sup> The Board ordinarily grants requests for oral argument, although it is likely to refuse if the request appears to be made for the purpose of delaying action, a not unlikely objective in the light of labor-organization competition. In the usual case, the oral arguments are held shortly after the date of request, and review attorneys begin work on cases almost immediately upon receipt of the record. That is to say that the representation cases were, by the latter part of 1939, on a current basis.

Upon receiving the review section's analysis of the case, and having received the briefs and oral argument if any, the Board issues to the parties an order dismissing the case or directiong that an election be held to determine the representative.<sup>22</sup> The Board indicates which unions are to appear on the ballot, which employees are eligible to vote, and the date on which to calculate eli-

<sup>20</sup> N.L.R.B. Inter-office Memoranda, M-1226, M-1228. Courtesy of chief trial examiner.

<sup>21</sup> Series 2, Article III, Section 8. Oral argument is held in perhaps a third of the cases. Since the trial examiner plays no part in the decision, as he does in a complaint case, no oral argument is held other than before the Board.

<sup>22</sup> In order to expedite emergency cases, by early 1937 the Board was issuing the direction of election without opinion. The direction of election provided for a secret election, and the Board would then issue the opinion with the certification.

When the review attorney is helping the Board in representation cases, he does not have the informal report of the trial examiner as he has an intermediate report in complaint cases, though he did have during the period when the review attorney had access to the informal file in a case.

The Board is more likely to seek additional needed information without reopening the record, because a representation case is purely investigatory. For example, the Board might request the regional director to ascertain whether the plant is operating when the Board is ready to issue its direction of election.

gibility. The Board would formerly certify upon the record at this stage of the proceedings the name or names of the representatives designated. But as has been indicated, the inability to trust union cards, the pressure brought by unions to obtain signatures or cards, the prolonged hearings to get the evidence into the record, all lengthened the hearing and opened the door to later discrimination against employees. By holding an election in every case, more consent elections resulted, records became smaller, and the proceedings moved more rapidly.

The directed elections are conducted by the regional director or some responsible staff member. Important elections are organized with the use of specialists, a group the Board developed, who are particularly adept at knowing and handling election procedure. The one who supervises the election tallies the ballots, rules on challenged ballots, and makes findings and recommendations, all of which are incorporated in an election report and served by the supervisor upon the parties. If done within five days, the parties may file objections to the report with the agent who conducted the election. The agent rules on the objections and notifies both the Board and the parties of his decision on the objections, and his rulings on the objections accompany his election report to the Board. If the Board feels that material issues have been raised by the objections, it will order a hearing before a trial examiner, which hearing will be patterned after the original. The record of the hearing on the objections is sent to the Board and is handled as is the record of the original hearing, although it rarely happens that the objections are not quickly disposed of without the necessity of another hearing. Thus, upon receipt of the election report alone, or of the election report and the report on objections, the Board proceeds either to dismiss the case or certify the name or names of the representatives for bargaining purposes.

From any point of view, this elaborate procedure provides ample opportunity for all parties to present their interests in any case. Designed primarily to meet due process requirements in what were essentially nonadversarial proceedings, the procedure was deficient in the most important aspect in which labor organizations were interested—it demanded too much time. The inevitable result was acrid criticism from the unions; and the criti-

cism based on the time element overflowed the bounds of "delay" and came to be associated with the idea that the Board deliberately favored one organization at the expense of the other by the speed at which representation cases were handled, a type of criticism wholly unjustified by the record. All organizations suffered because of the delay, but there was no inequality of treatment. If the Board may be criticized for the delay, it must be on the ground that the procedure set up simply involved too many days, a fact which even the Board realized and eventually took steps to correct. The median number of days for each stage of the representation proceedings where formal action was instituted show that procedural changes were desirable.<sup>23</sup>

<i>Stage of proceeding</i>	<i>Median number of days</i>
Petition to hearing	49-52
Number of days of hearing	6
Hearing to direction of election	51
Direction of election to election	19
Election to decision	36
Hearing to decision	62
Total—Petitions disposed of after election	161-164
Total—Petitions disposed of without election	117-120

By 1939 the Board was rapidly reducing the backlog of cases, so that by November it was on a "current" basis. In that month the median time elapsed between the hearing date and the issuance of the decision was 32 days and in December it was 36 days,

<sup>23</sup> Smith Hearings, Vol. II, No. 14, pp. 445-446. The figures cover the period from October, 1935-June 30, 1939. CIO cases required between two and three weeks longer to certification than did AF of L cases. For unaffiliated unions the median was 187-194 days. This was because of Board skepticism regarding independent unions. The Board exercised great caution and investigated independent unions thoroughly to be sure that no employer domination was present. This was especially true when the employer had been guilty of violations. In those cases where formal action was not required and the case was disposed of by consent election, recognition, payroll check, withdrawal or dismissal, the median for each method was only a fraction of the median where formal action was necessary. The overall median for all cases so disposed was 37 days. For the CIO the median was 32 days; for the AF of L the median was 37 days; for the unaffiliated unions the median was 60 days. By early 1940 the "average" time for cases involving formal action was down to approximately four months from petition to decision. Monograph No. 18, p. 87.

as compared with the average through the first four fiscal years of 62 days. 1940 saw the days required reduced to 22 by June.<sup>24</sup> By 1941 the Board was issuing decisions in consent elections within three weeks on the average, and in ordered elections priority was given to cases arising in defense industries.

The delay—or perhaps better, the length of time necessary for representation cases—involved more than the procedure set up by the Board. An outstanding factor was the filing of cases following the *Jones & Laughlin* decision in April, 1937. But considered in and of itself, the Board procedure was so lengthy as to cause the Board to develop a "streamlined" method for certification that would require far less time, usable, however, only where the parties would be agreeable to an election.

Throughout its history, the Board used the consent election where the only question to be resolved was the majority; but a consent election never led to a certification. It sometimes happened that the union desired official certification as verification of its status; yet a formal hearing seemed unnecessary except possibly to protect the employer from maladministration. The Board therefore directed the legal division to devise a procedure that could be connected with the consent election and yet would avoid the necessity of going through the formal hearing. The legal division developed such a procedure, and it was adopted in November, 1939.<sup>25</sup> The chief legal problem involved, and the problem which the legal division had to solve, was whether, under the wording of the statute, there could be a certification without holding a hearing. The solution was reached by providing that the parties waive their rights to a hearing by agreement and stipulation so that in those cases where unions desire certification and the election is agreed to by all parties, expedition of the case is possible.<sup>26</sup> A consent election on a stipulation basis has the fol-

<sup>24</sup> Smith Hearings, Vol. II, No. 14, p. 546; Vol. IV, No. 11, p. 359. The Board came to realize that representation cases lost all significance if not handled immediately, hence arbitrarily decided to get the representation cases current even to the detriment of complaint cases.

<sup>25</sup> This was against the wishes of one of the Board members, who characterized it as "nonsense." The characterization was based upon a belief that less legal formality should be had in representation cases and that the Board erred in duplicating the complaint procedure in the representation procedure. For all points of view see Smith Hearings, Vol. I, No. 1, p. 18; Vol. II, No. 12, p. 415.

<sup>26</sup> Regional directors were instructed that every effort was to be made to adjust the case informally; and the new procedure was to be used only where, when the

lowing steps: (1) a request for authorization of investigation and hearing, and an order for investigation and hearing; (2) a stipulation for consent election and Board certification; (3) the holding of the consent election agreed upon and the transmission to the Board of all formal papers, including the election report, objections, and report on objections; (4) the Board certification on the record or dismissal of the case.<sup>27</sup> So far as speed and administration are concerned, the stipulation is worked out in the field; and no Board approval of the stipulation is necessary. At the conclusion of the election stage and upon receipt of the record, the Board handles the record and its decision as it handles all other representation proceedings.

Provision has been made by the Board to use the new expedited procedure in those cases where no election is necessary and yet certification is desired by the union. Under the auspices of the regional director, it is determined whether there is a majority by a check of the company's payroll against the union membership claims. In such a check the Board insists that dues or membership cards be offered as proof rather than authorization cards.

union desired certification, the parties were willing to stipulate for a consent election and waiver of hearing. Smith Hearings, Vol. II, No. 13, p. 539.

<sup>27</sup> The stipulation must cover facts relating to parties, commerce, labor organizations, the question, the unit, the election agreement, the waiver of hearing, and the record.

## Chapter XVI. THE DISPOSITION OF CASES

Whenever a charge is filed alleging an unfair labor practice or a petition is brought to certify a representative, the Board designates either action as a "case." All cases are either pending, which means that they are in some stage moving toward disposal, or are disposed of. Disposition falls into two broad categories: (1) disposition before formal action; (2) disposition after formal action. Where formal action is instituted in a case, disposition comes only after the case is transferred to the Board unless the regional office disposes of the case after formal action has been taken but before the case is transferred to the Board. Since most cases are disposed of by informal action, only a small percentage reach the stage where disposition must be made after formal action has been taken by the Board.<sup>1</sup> The disposition, a recapitulation of the material on procedure, may be outlined:

### A. Disposition Before Formal Action

#### 1. *Dismissals*

In complaint cases where the regional director finds no basis for a complaint, he dismisses the case. If the filing party petitions the Board and the regional director is upheld, then the case is dismissed by the Board. In representation cases, if the investigation shows that no question of representation exists, the regional director requests a dismissal order from the Board.

#### 2. *Withdrawals*

In complaint cases, the filing party withdraws the charge, and usually does so after the regional director has made an investiga-

<sup>1</sup> Smith Hearings, Vol. II, No. 10, p. 356.

tion and recommended to the party that the charge be withdrawn. In representation cases the petitioner will request permission to withdraw the charge, and the Board almost invariably gives its consent.

### B. Disposition After Formal Action

Cases may be settled, withdrawn, or dismissed after formal action has been taken but before the case has been transferred to the Board. Such disposition may come at any stage of the proceedings, and does, although but a small percentage of cases are disposed of in this fashion once formal action has been taken. Some of the Board's trial examiners, for example, have a conspicuous and demonstrated ability to bring about a satisfactory settlement of a case during or at the close of the hearing; and such settlements really reflect the trial examiners' method of approaching the parties and resolving a conflict that would otherwise lead perhaps to extended litigation.

### C. Disposition After Transfer to the Board

If the trial examiner prepares an intermediate report in complaint cases and there is compliance with the affirmative recommendations of the report, the case is regarded as closed. If not, the Board continues the case, and this was the usual course of action in the first five years of the Board's life. If the intermediate report recommends dismissal and there are no exceptions by the filing party, the case is regarded as closed. Relatively few of the cases in which formal action is taken are settled, dismissed, withdrawn, have compliance with the intermediate report, or fail to have exceptions where the intermediate report recommended dismissal. Usually, when cases once have formal action taken on them by the Board, the case goes through to a decision and order. When this occurs, the case is regarded as closed when there is compliance with the affirmative part of the order, for which a court order may be necessary; and the negative portion of the order remains in effect indefinitely. In the event that no unfair labor practices are found by the Board, the Board issues an order dismissing the case; and the case is regarded as closed. It is to

be mentioned that the Board may dismiss a complaint in part, and sustain the charges in part; and many cases going through to decision and order are of this nature.

In representation cases, the case is transferred to the Board at the close of the hearing; and the case is regarded as closed when the petitioner is certified or the petition dismissed without any certification. The certification, if made, may come after a hearing where sufficient evidence is disclosed to enable the Board to certify without an election; it may come after a directed election, or after a consent election or other method where the union desires certification.

#### D. Settlements

Settlements may come before or after formal action has been taken. Mention has been made of the settlements reached in the regional office after charges have been filed in complaint cases, and such settlements are regarded as closing a case when affirmative action is taken that is acceptable to the filing party.<sup>2</sup> Representation cases are settled when an agreement satisfactory to the parties is reached; and this carries with it the consent election, the payroll check, or recognition of the bargaining representatives, usually engineered by the regional office. Settlements that are reached after a complaint has been issued constitute, however, an extremely interesting phase of the Board's work that is of the utmost importance, from the viewpoints of both the administrative process and labor relations.

##### 1. Before or During a Hearing

It often occurs that before or during a hearing the attorneys for the Board and for the respondent will hold conferences. The attorney for the union may participate. It becomes evident to all that a settlement is the only proper way to handle the controversy and thereby avoid any or further litigation. Perhaps the impelling motive will be that the field examiner's facts, when prepared

<sup>2</sup> The informal settlement may include a stipulation which has no legal significance for the Board and which really does not include the Board as a party. The only legal effect of a stipulation is that attaching to possible legal action in a court by the union on the grounds of specific performance in the event the employer does not perform under the agreement.

for trial, will not support the charges that the Board has incorporated in the complaint and the court hazards loom large. It may be, and has quite often been the fact, that the employer discovers that he was unaware of action taken by his directing force and he finds that his defense is nil. This type of situation is more likely to occur during a hearing when the Board has already demonstrated to the employer that it has the facts. There may be legal questions presenting themselves to both sides that are extremely difficult and indicate lengthy litigation with the outcome dubious for all. In such situations, in order to save useless litigation that would benefit no one, the attorneys for all will draw up a stipulation,<sup>3</sup> based not upon the intent of the respondent, as they are, for example, under the procedure of the Federal Trade Commission, but wholly on the practical, workable grounds that any other course would be foolhardy for all in light of what counsel for all parties know. This procedure was almost unknown in the early years of the Board because the inexperience of lawyers led them to litigate all cases through to Board decision. This is still true of many lawyers, although the Board has noticed an impressive change in the attitude of the legal profession. Only a small proportion of lawyers who have had experience practicing before the Board continue to resist treaties for settlement. Most of the experienced lawyers not only are likely to settle but are desirous of settling a case. In addition to their willingness and desire to settle cases, the experienced lawyers are also cooperative in working with the Board in carrying the settlement through to its conclusion. The inexperienced lawyers still perform as did most lawyers when the Act was first passed: They refuse to believe it is a law that has been sanctioned by the Supreme Court. The Board is unable to reach any satisfactory settlement with such groups but rather must litigate each and every case, a task which the Board resists and attempts to avoid.

The stipulation is signed by the Board, the union, and the respondent. The Board's approach is that technically the Board and the respondent are the parties at issue, and the Board is litigating the case for the Government. But the Board has recognized that the complaining union has an interest in the case, and at least as a

<sup>3</sup> In fact, the stipulation is usually drawn by the Board attorneys and simply presented to respondent's counsel.

matter of proper public relations it attempts to secure union approval of settlements which dispose of cases filed by unions.

If the stipulation is entered into before the hearing is started, or during the hearing, the trial examiner is notified; but the trial examiner does not enter into the drawing of the stipulation. The regional director possesses the approval power locally for the Board. The trial examiner enters the stipulation as a part of the record in the case; and the Board, upon notification, transfers the case to itself with no intermediate report by the trial examiner.<sup>4</sup> Before transferring the case the regional director will have sent a copy of the stipulation to the litigation division of the Board. The litigation division reviews the stipulation, not to evaluate the substantive terms and conditions, but rather to make certain that the substantive terms provide legally for that which the stipulation purports to provide for all parties; and since an order will be involved, it is important that the Board guard carefully the language employed. When the litigation division approves the stipulation, a memorandum of the case is prepared for the Board; and the Board then draws an order transferring the case, the record of which goes to the review section. The review section then drafts an "Order Based on Stipulation," or what is sometimes referred to as a "Consent Order," which embodies the terms of the stipulation. This is presented to the Board for signature and becomes a Board order.

The stipulation will provide for the issuance of the Board order as well as specify with some precision just what the order will provide and the company's agreement to the order, and there will be a stipulation that the Board order to be issued will have the same effect as would an order issued in the absence of a stipulation. In addition, there may be stipulations as to facts, or there may be waiver of the elements of proof.<sup>5</sup>

One of the most important parts of a stipulation is that paragraph which provides for the consent decree. For the first several years of its history, the consent decree was not regarded as es-

<sup>4</sup> The stipulation will provide that it shall become a part of the record in the case. A trial examiner's evaluation of a settlement might be ascertained if the Board is in doubt as to approval.

<sup>5</sup> Many fact stipulations are entered into in all Board cases involving litigation. This enables issues to be narrowed through agreement, and results usually from the efforts of attorneys for both sides. While very important as a legal aid, the stipulation here under consideration is really a method of case disposition.

pecially important; but in recent years the consent decree has been regarded as of equal importance with the consent order in settlements by stipulation. The paragraph is important because it carries the consent of the respondent for the Board to file in the United States circuit court of appeals a petition for an enforcement decree to enforce the stipulation order to be issued and is regarded as indicative of the good faith of the employer. The Board order is then filed in the circuit court of appeals, and the court issues an order enforcing the order issued by the Board. In the event, then, that the employer fails to fulfill the stipulation, the Board has a ready-made contempt-of-court basis upon which to proceed against the employer.<sup>6</sup> The Board invariably attempts to obtain a consent decree in all stipulations,<sup>7</sup> although it does not always succeed.

## 2. After a Board Order but Before Enforcement

If a Board order has been issued in a case and enforcement has not followed, settlements may still be reached. The problem is then one of compliance. If the employer complies with the Board order, there is of course no problem. But if the employer does not comply, he may carry on negotiations with the Board in an endeavor to reach some agreement short of the commands in the order. Presumably, if the employer outrightly refused to consider the Board order and if the Board had a firm basis for its order, the Board would petition the court for enforcement; and settlement would be out of the question. If negotiations are carried on and if a settlement is reached, again the stipulation will be the basis for a consent decree covering what will probably be a modified order.

The modified order is issued in place of a vacated original order. Suppose there is an original order commanding the reinstatement of 17 workers and that at the time of the order 10 have found jobs elsewhere. Only 7 actually remain to be reinstated; hence under a stipulation with the respondent the Board will modify its original order by the issuance of the modified order

<sup>6</sup> But by early 1941 the problem of securing compliance with the decrees had become one of major importance. Moreover, by July 1, 1941, approximately 772 consent decrees had been entered in the courts. Board Release Z-1359.

<sup>7</sup> The employer is usually required, under a stipulation, to notify the Board as to the action he takes to meet his stipulation. Thus, the Board "follow-up."

and a consent decree provision. The same procedure would be used if the employer offered to make a lump-sum payment in an order requiring back pay or if the enforcement section were to find weak evidence in a case coming up for enforcement. Where a modified order is based upon a consent decree, the court must modify the original order. The contempt basis as a safeguard in a modified order is the same as a stipulation and consent decree under an original order.

### *3. After Enforcement Petitions*

While it is rare for a settlement to occur after the Board has petitioned the circuit court for enforcement of an order, it happens. In such an instance the stipulation is drawn, the Board issues a modified order with a consent decree, and the court is petitioned to modify the original order on the basis of the stipulation.

## E. Specialization in Settlements

When considering the Board as an administrative agency, one might suppose that prior to formal action the Board would make every attempt to resolve conflicts and avoid litigation, as the Board does; but one would not ordinarily expect that there would be any kind of settlement short of full compliance with a Board order after a Board decision has been rendered. It has been outlined how settlement is effected even after a complaint has issued, but a more detailed view of the settlement work is necessary in order fully to appreciate the uniqueness of the Board and the substantive problems with which it deals. Such a view will also serve to illuminate certain of the Board's operations as well as to indicate an important problem which surrounds the Board as administrative agency.

It has been pointed out that prior to April, 1937, the Board did not encourage unions to file charges since the Board was feeling its way and selecting test cases on the basis of substance or jurisdiction. The cases that were accepted and came up to the Board really depended in the first instance upon the regional office judgment. There was little court activity so far as the Board was carrying cases through to the circuit courts, although there was a

tremendous burden of cases going into the district courts by reason of employers seeking injunctions against the Board. When, however, the Act was sanctioned by the Supreme Court in 1937, the Board began to enter the circuit courts of appeal quite actively in order to enforce Board decisions, so that by the fall of 1938 there had been and were a considerable number of cases in the courts. In addition, there was by then a heavy accumulation of cases not yet litigated, many of which were not being carried to the courts because of a series of reasons: Slight differences between the parties made it appear unreasonable to litigate, for litigation would have cost more than was involved; changes in the corporate structure, or a company going out of business, left the status of the case unknown; some of the circuit courts were opposed to the Act and to the Board, and the sensitive litigation division discouraged litigation because it knew that weaknesses would prove the legal undoing for the Board; in some cases the facts were changed through time, such, for example, as the union's and the employer's reaching an agreement, in which event litigation would have been superfluous as well as a cause of antagonism; sometimes bankruptcy or receivership set in, which was also a change of facts that made the case a salvage problem; in some cases the Board had committed minor legal errors, such as error in service, and in those circuits where the Board cases would be overthrown if they were short of any but the strongest possible presentation, Board litigation would have been stupid and disastrous.<sup>8</sup>

Too, when the Board began intensive settlement work where a Board decision and order had issued, some of the cases dealt with extended from 1935 and 1936. The Board could not with good grace go into the courts and seek enforcement on cases of such age. The Board might have ignored such cases, but to have done

<sup>8</sup> For example, in one case one employee had filed a charge, and the Board issued a complaint alleging violation of four of the five unfair labor practice proscriptions. The Board's decision sustained two of the charges and dismissed two. One of the Board members dissented on the grounds that substantial evidence was lacking to sustain the Board decision. Apparently the Board's litigation attorneys thought that the preponderance of evidence favored the respondent but that substantial evidence existed perhaps to justify a petition for enforcement in the circuit court. Because but one worker was involved and because the court might reweigh the evidence and base a decision on the preponderance rather than substantiality, the suggestion was made by Board attorneys that the case be settled. See Smith Hearings, Vol. II, No. 6, p. 223.

so would have brought union insistence that the plight of the employees be cared for, an argument that would be persuasive. Moreover, even in 1937 and 1938, as well as in 1939, 1940, and 1941, the Board was deciding cases faster than the litigation division and the courts could enforce them; and at least one recourse for that situation was to seek settlement and thereby relieve the litigation division.

In recognition of the foregoing reasons, the Board through its general counsel and associate general counsel had been endeavoring to reach settlements in order to clear the load of cases. In order to facilitate such work, the Board assigned one of its lawyers, who had begun with the first National Labor Relations Board, to settlement specialization. The success of the designee was conspicuous when full time was devoted to this function; and between September, 1938, and January, 1939, the efforts made were sufficiently successful to justify the creation, in January, 1939, of the settlement section as an arm of the enforcement section<sup>9</sup> charged with the performance of an auxiliary function of the Board. As visualized by those in charge of the settlement section, such function was a mixture of legal technicalities and labor relations, that is, to provide a basis for employer-employee relationships under the expressed public policy and still avoid litigation. Indeed, it is said that the very nature of labor relations lends itself to settlement rather than litigation, for if settlement can be reached the trouble is cleared away, while if litigation is necessary following a Board order the Board's real difficulties—such as enforcement, follow-up, reinstatement, employer relations, and a whole gamut of questions concerning employer action—then commence.

The work of the settlement section may be classified into three categories:

(1) Those cases where there was really full compliance with the policy expressed in the Act but some minor differences existed between the employer and the Board. For example, the order may have called for reinstatement with back pay, but the employer had found it necessary to lay off men. The employer

<sup>9</sup> The section was sometimes referred to by Board employees as the "Chamberlain section"; the basis for such appellation may be gleaned from the work of the section. Perhaps such references indicate the approach of many of the younger members of the Board's staff.

agreed to the back pay; but a problem arose in the reinstatement, such as seniority, and then a settlement was necessary.

(2) Those cases where there had been a change in the facts so that it would have been pointless for the Board to litigate. An excellent example may be cited, drawn from an actual case which was settled: Union X brought a charge of discrimination against an employer. The decision called for reinstatement with back pay aggregating \$2500. In the meantime the employer had agreed to give the union a closed shop, including the check-off, and vacations with pay. The vacations alone amounted each year to a sum considerably larger than \$2500. The employer had a record of almost violent anti-union opposition; and he was an important producer in the industry, so much so that unionization of his plant probably carried with it unionization for the industry. The union and the employer were extremely desirous of reaching a settlement, and one was effected which provided for only reinstatement. The back-pay portion of the order was dropped.

(3) Those numerous cases where the employer desired to settle when the Board decision had found a violation, but merely as a matter of "face" the employer desired that some parts of the Board order not be enforced and for that reason he was willing to settle. The desire of the Board to avoid litigation and the responsiveness of the employer led to a settlement.

By 1940, cases handled by the settlement section originated chiefly with the litigation division. These were cases where a Board decision had been handed down, and the next stage ordinarily was the enforcement of the decision in the absence of compliance. In addition, cases were sent to the settlement section from the office of the secretary, from the review division, and in some instances from the regional directors. While originally the settlement section confined itself to cases where enforcement was the problem, the circumstances confronting the Board led to an expansion of the specialized settlement work so that cases came from all stages of proceedings and the section was called in at all stages, even including cases where no complaint had ever been issued but the advantages of specialization were useful.

This expansion had its origin in March and April of 1939. The Board was then confronted with a tremendous backlog of cases that jammed up in the review section as a result of the great num-

ber of charges filed after the constitutionality of the Act was upheld. In order to relieve the backlog, the settlement section took some 50 cases from the review section, some of which they were able to dispose of. At approximately the same time the regional directors were informed that the settlement section was available to aid in securing compliance with the Act once a decision had been rendered or even to assist before any decision was reached. The result was that the section was often called upon by regional directors, and the efforts made in conjunction with the regional directors were regarded as quite worth while. In some offices particularly, the section had very real results. The settlement section sent men to various regional offices from time to time, for example, to Fort Worth, New York, Minneapolis, and Los Angeles; and the men remained in the office for a period and aided the regional director in disposing of particularly difficult cases or cases which had been offering problems to the regional director. This type of service was of some importance since it relieved the burden of the regional director; and taking account of the whole picture, it thereby indirectly improved the pace at which cases were able to move through the complex Board machinery.

The personnel of the settlement section devoted full time to a task in which they were fairly successful, as is indicated by the following statistics:<sup>10</sup>

#### STATUS OF ALL CASES REFERRED TO SETTLEMENT SECTION

	Total	Before board decision	After board decision
Cases	277	81	196
Open	34	6	28
Closed	243	75	168
Settled	136	40	96
Per cent settled	56	53	57
Decrees	91	27	64
Per cent decrees	67	67	67

In contemplation, the settlements reached were supposed not to compromise the spirit of the Act. The nature of the spirit of any act really means that the enforcing agency determines

<sup>10</sup> As of April 30, 1940. The figures are from Board Release Z-826, prepared primarily for Board use. The director of the settlement section kindly made the figures available.

whether certain actions of an alleged violation square with the public purposes, and the good faith of the agency is the only safeguard against settlements which would compromise the spirit of the Act. In actuality, a settlement was a compromise; and the Board yielded something, such as back pay or reinstatement, in order to accomplish it. Apparently, there was as little compromise as could be managed and still obtain a settlement. When it is remembered that there is a legal hazard in every case that is litigated, and the Board *does* remember this, and when this ordinary hazard or loss expectation is discounted, there is meaning in the idea that the Board has always endeavored in its settlements to do as well or better, on the average, as it could do if litigation were the course pursued.

In any given case the settlement actually reached depends upon the bargaining process between the Board's agents and the respondents. While the unions are invariably consulted or their approval of a settlement is sought, the Board will settle a case even when the unions do not approve, although this seldom happens. The unions quite often get impatient with settlement procedure, and they demand enforcement of the order. Such impatience does not ease the Board's task. Ordinarily, however, the Board may expect first to work for a settlement and then to consult the unions during such work or seek approval of a concluded agreement. If the Board has a strong case—that is, if the decision is anchored in ample evidence—it will be likely to compromise but little in order to avoid litigation, and it will stop but slightly short of virtual compliance with the order. Weaker cases will find the Board endeavoring to work out something in terms of back pay and reinstatement, although back pay will more likely be sacrificed than reinstatement for the reason that an employer will usually come to terms much more readily if he is faced only with reinstatement.<sup>11</sup> In extreme cases, the Board might insist only

<sup>11</sup> This is a fair statement, but it must be obvious that generalizations regarding what are essentially compromises are hazardous. In one case, for example, back pay and reinstatement were both yielded, reinstatement completely. Back pay had been ordered for two employees for a period approximating four years. Upon recommendation of the Board's legal counsel, the case was not enforced because of the weakness of evidence, the possible defense of the respondent pleading laches, arbitrary action in ordering back pay, and "the fact that enforcement would have to be sought in the Tenth Circuit. . . ." A settlement was reached whereby each employee received the sum of \$300, and the company posted notices of the Act

upon the posting of notices, which do not injure the employer; and yet the Board salvages something from the case. After back pay and reinstatement, the settlement section works on the representation angle. Thus, settlements may be expected to vary all the way between two extremes, which are full compliance at the one end of the scale and the vacating of the Board order at the other.

Despite the rigorous procedure set up by the Board, cases sometimes got through the decision stage and came up for enforcement, which cases the litigation division regarded as hopeless for litigation. This occurred in part because of the separation of functions. Another reason was the fact that what Board members saw in cases might be invisible to judges if the case went to litigation; yet, as expressed by one Board member, such invisibility did not relieve the member of the responsibility of deciding the case on what he saw rather than what he thought the judges might see. Rendering decisions in such instances did, however, raise a question as to whether litigation for purposes of enforcement would be a hopeless venture, especially in those cases where the litigation attorneys were unwilling to litigate because the court in which the case would land meant an increased-loss expectation. The result was the existence, until about 1940, of what were called "weak" or "buried" cases that were not enforced, settled, nor otherwise disposed of. Such cases might have arisen in scattered instances from inefficiency alone, but probably the nature of the administrative process is the important factor to be considered. The specialized tribunal in purpose is to see symptoms

together with a statement that their relations with their employees were governed by the Act. Smith Hearings, Vol. II, No. 5, pp. 146-147.

That employers are not always happy with settlements is shown by another case where the Board attempted a settlement involving back pay of \$20,000 instead of a sum which the company estimated might be as high as \$175,000 if the Board won in the courts. The company was charged with aiding an AF of L affiliate. The company thought it was faced with (1) a petition to the court to review the order, which would cost heavily for the transcript alone; (2) a petition to the Board for a rehearing, which would be expensive; (3) a settlement. The company agreed to a settlement on the back pay and also agreed to reinstatement and an election to determine the bargaining representatives. Although the settlement section regarded the settlement as fair and equitable, the counsel for the employer testified with regard to the stipulation: ". . . We figured we were slugged into paying a nuisance value. We are willing to pay a nuisance value to get out of it. We aren't satisfied with the result of the case." The \$20,000 was to be paid in a lump sum and divided by the regional director. Smith Hearings, Vol. II, No. 8, pp. 269 ff.

not generally visible to general practitioners; hence so long as dependence is placed upon specialists, the advantages of which are obvious, there will be such cases because of the inherent characteristics of the administrative process. What a judge can't see isn't there.

It was in these "weak" or "buried" cases where the settlement section made its greatest compromises, especially on the back-pay issue. Only in comparatively few of the Board decisions did the litigation attorneys recommend the avoidance of litigation, but in some instances the cases were turned over to the settlement section.<sup>12</sup>

The settlement section found the most objection to its work coming from the unions. Their attitude was and is that "the Board has rendered a decision in our favor, now they should enforce it; if they do not enforce it, then we are being 'let down.'" The employers, on the other hand, while perhaps not liking the settlement, at least do not resent it as do the unions, for in the very nature of the case the employer feels that the Board is yielding something, which it is, and this thought is soothing. It is easily understood why the unions would regard compromise as evidence that the Board is negligent of union interests, a thought encouraged by the Board itself in seeking union approval of a settlement reached while functioning as a governmental agency promoting public policy, not union policy.

The situation appears in part to be this: Experience dictates that whenever the Board loses a case in a circuit court of appeals, there is tremendous encouragement to employers to violate the law and to fight Board decisions through the courts. This means that the Board must consider with caution just which cases to litigate in light of the tenor of the circuit courts of appeal. Cases which are not strong and which are taken into the courts for en-

<sup>12</sup> Ten per cent is a maximum estimate. It is difficult to know with any exactitude just how many cases have been "buried" or have decisions based on evidence that would not survive some court jurisdictions. Chairman Madden testified in the Smith Hearings, Vol. II, No. 17, p. 688, that he knew of "perhaps a dozen" cases where the Board had rendered a decision and then the enforcement division recommended no court enforcement because of the weakness of the case in light of the different jurisdictions. Other estimates have ranged from "three to four cases" to the 10 per cent figure above. Probably there have been few real errors in decisions. The settlement section's functions are derived more from the desire to avoid litigation, changed conditions, a desire to settle in order to have better feelings, procedural defects, or weakness in cases.

forcement increase the difficulties for the Board, especially where the judges are anti-Board and anti-Act. Moreover, judges tend to grow weary of a long series of labor cases and begin to react unfavorably. If every case were to be litigated, administration of the Act would be far more difficult than it is when making use of the settlement as a means of avoiding litigation. The alternative facing the Board is the unions' resentment of what they may regard as compromising the Act. If litigation were to be increased, union resentment might be decreased; if the Board's litigation record were not good because of the weakness of cases, the resentment of the unions would then be directed against the courts instead of the Board, as now. If the litigation record of the Board in increased litigation were to be as good or better than now, then the resentment of the employers might be increased; and this would probably bring increased problems for the Board. There is seemingly little choice between union resentment at the Board and fewer problems generated from the employer, on the one hand, and more problems generated by the employer and more union resentment against the courts, on the other. The Board therefore, without expecting the unions to see other than their own part of the picture, chooses to use the settlement and thereby save administrative energy.

The most compelling factor is the fact that the Board has never had sufficient funds and personnel to enable it to enforce by litigation all cases it desired. If the Board had had a larger number of litigation attorneys, enforcement could have kept pace with decisions, for certainly in many cases the Board could have followed a decision with early petition for enforcement by the court. As it was, the Board would, so to speak, go to the employer "with hat in hand" and seek compliance on an order that was handed down from a quasi-judicial agency, presumably upon sufficient evidence and after due consideration of the record. Board prestige would have been far more secure with more litigation attorneys, for failure to enforce a Board order when the employer suspected the reason was weakness was contagious and damaging to prestige.<sup>13</sup> Larger personnel for litigation might have meant

<sup>13</sup> Board member Edwin Smith, in a speech, *The National Labor Relations Board and Business*, before the Harvard Business School Alumni Association, June 18, 1938, said in part: "The Board is not a mediating agency. It is a quasi-judicial body entrusted with a definite responsibility for building up a body of law on

resentment by unions against the courts, but not against the Board. Decisions simply came too fast for enforcement, the unions decried and protested the consequent delay, and the only recourse for the Board was to establish the settlement section.

Neither the Act nor its spirit contemplated mediatory or conciliatory functions by the Board; yet the settlement work surely falls on the border of enforcement, on one hand, and conciliation among the Board, the employer, and the labor organization, on the other. This is heightened by the consideration that the course of settlement has broadened from its use only in cases where the Board decision had come down and litigation was the next step, until by early 1940 there was effort to settle cases prior to a Board decision and the settlement section was functioning actively at every stage of proceedings. There can be no convincing argument that the settlement is not a sane and worthy function for the Board; and the relationship of employers and employees, in a broad and fundamental sense, is promoted by settlement rather than made more difficult through and because of court litigation. If, however, the outstanding characteristic of an agency such as the Board is the legalistic approach which was used—and except for the settlement work the foregoing account of Board procedure clearly crystallizes and makes prominent the legal approach which dominated every move made procedurally by the Board—then the settlement section seems a kind of contradiction.<sup>14</sup>

Contemplation, at one extreme, of the painstaking care with which the Board protects procedural due process and, at the other extreme, of the efficacy, through settlement, of the quasi-judicial process poses the fundamental problem of the Board's approach. In a broad sense, the settlement section indicates the inadequacy of the purely judicial approach where a quasi-judicial agency was meant to operate. When charges are brought to the important matters covered by the statute. . . . A quasi-judicial agency cannot indulge in any such *quid pro quo* tactics which may temporarily satisfy both the employer and the union. It must, if it finds the employer doing an illegal thing, proceed to the best of its ability to make him cease and desist from those specified acts. . . . Its function ends at that point." N.L.R.B. Press Release R-984.

<sup>14</sup> Cf. Max Radin, *Law as Logic and Experience*, Yale University Press, Chap. III, where is developed the argument that most of our legal processes might well incorporate the arbitration process, which looks to future human relations, and that we might well discard the useless attempts to ascertain "right" and "wrong" of past events.

Board, one adversary is charging another; and although the Board is the legal opposition, there is never doubt that the Board in fact necessarily functions primarily to assist the union even if that is not the objective. This is especially clear when the Board holds conferences with the unions whenever an adjustment or settlement is sought. And despite the legal theory that union benefits are incidental and that individual benefits are primary, the fact appears to be the reverse of the theory, not as a matter of Board objective but as a by-product and result of the Act itself and the procedure set up by the Board. This is not to say that the Board should not confer with the unions, for any realism regarding employer-employee relations dictates that the improvement of such relations will come only by a unified and common recognition that it is organized labor, which is a permanent, definite, and distinct part of the economy, that must be dealt with, not the individual employee. But when one considers the implications of the settlement function, which ought to be and ought to have been promoted, in the face of the judicial and legalistic efforts surrounding the Board's work, there is raised the question as to whether the Board was too "judicial" in its approach; and the answer to this question will lie in one's conception of the administrative process and its limitations.

#### F. The Compliance Unit<sup>15</sup>

The filing of a consent decree in court does not in itself bring compliance. During 1937, there was 1 contempt case filed by the Board to secure compliance under a court decree; in 1938, there were 2 cases filed; in 1939, there were 9 cases filed; and in 1940, there were 15 cases. In addition, there are difficult problems attaching to the computation of earnings, the figuring of interim earnings, the arrangement of preferential hiring lists, etc. It was regarded as desirable to centralize authority in such matters and to provide specialists for such work; and in June, 1940, the Board created the Compliance Unit. The unit's functions embrace all formal proceedings involving compliance with court decrees, the functions formerly carried by the settlement section as described above, and calculations in involved back-pay cases.

<sup>15</sup> See Board Release Z-1859.

At the end of fiscal 1941, the unit had handled 245 cases, including compliance with Board orders and compliance with court decrees. The unit closed 177 cases involving compliance with Board orders before litigation, of which there was *substantial* compliance in 55 cases and the entry of consent decrees in 28 cases. But since by 1941 most doubtful questions of law had been resolved and since the great backlog which confronted the enforcement section after 1939 had been considerably reduced, the Board was foregoing partial compliance—which is to say, settlement—in favor of substantial compliance; hence settlement work was dwindling and the unit was devoting more effort to obtaining compliance with court decrees.

In handling the problem of compliance with court decrees, the unit operates both formally and informally. Formal proceeding means that the Board files a petition for civil contempt; and although the number of such cases has increased each year, many cases are disposed of informally. For example, in fiscal 1941 there were 15 contempt cases; 25 cases were disposed of by voluntary compliance; 8 cases, after investigation, did not warrant the institution of formal proceedings. The regional offices have more and more assumed the task of getting compliance with Board orders—*i.e.*, settlement work—but the compliance with court decrees is increasingly handled virtually as a specialized task by the compliance unit, and the regional office is participating less and less.

At the beginning of fiscal 1941, 3 petitions to adjudge respondents in contempt were before the courts. The Board filed 15 more petitions in fiscal 1941. Of the 18 cases, 6 were pending at the close of the year, and 12 had been disposed of. Seven cases were closed by court orders adjudging respondents in contempt; 5 were settled after the petition had been filed. The total petitions filed in previous years was 8, of which 6 were dismissed.

#### G. Pressure to Compel Compliance

##### 1. *Blacklisting Through the R.F.C.<sup>10</sup>*

In a few cases the Board has attempted to obtain compliance with its orders through collaboration with the Reconstruction

<sup>10</sup> Smith Hearings, Vol. III, No. 3, pp. 78-81.

Finance Corporation. This method of enforcement was alleged by the enemies of the Act to be "blacklisting," a term chosen because of the supposed similarity of the Board's activity to that used by employers when they refuse to hire a union man because of his union affiliation. The Act and the Board proscribe blacklisting by the employer. In fact, the Board's practice did not merit the distinguishing and relatively powerful term "blacklisting," for the Board's efforts were really quite mild, lawful, businesslike, and hardly of the blacklist character.

Whenever the R.F.C. receives a loan application, the applicant must indicate that he is abiding by all the laws; and whenever any difficulty appears that would lead the R.F.C. to question whether laws were being respected, just as a matter of proper business methods the R.F.C. investigates the situation. So far as the R.F.C. was concerned with Federal laws, that agency had made an arrangement with the National Labor Relations Board, the Treasury, the Bureau of Internal Revenue, the Department of Agriculture, the Department of the Interior, the S.E.C., the Federal Power Commission, the Comptroller of the Currency, the F.D.I.C., and the Wages and Hours Division of the Department of Labor whereby the R.F.C. exchanged information with those agencies as a matter of credit information. The R.F.C. sends to the agencies a list of disbursements made; and if any company is receiving disbursements and also violating the law in some respect, the agency whose laws are being violated can request the R.F.C. to withhold disbursements. The R.F.C., however, retains the choice to withhold or to refuse to withhold disbursements in its own discretion, so that the Board, as an agency, in effect would be making only a recommendation.

As of February, 1940, this arrangement between the Board and the R.F.C. had been translated into action in four cases. In all four cases the R.F.C. was requested by the Board to withhold disbursements. The R.F.C. did so in one case; in another case the loan was allowed the following day; in one case the loan was withheld for two weeks; in the other case the loan request was withdrawn by the firm because it decided to obtain its money from a bank. In light of the similarities in arrangements existing between the R.F.C. and other Federal agencies, as well as the Board, it seems grossly unfair to seek out the Board and char-

acterize its cooperative effort with the R.F.C. as "blacklisting." In any event, the R.F.C. made the loans, not the Board.

## 2. *Blacklisting Through Public Contracts*

The Walsh-Healey Act was approved on June 30, 1936.<sup>17</sup> That Act was to prevent price competition for Government contracts based upon wage reductions. The Act provides that, with certain exceptions, every Government contract for \$10,000 or over must carry an employer's agreement that he will abide by the basic labor standards provided in the law: the eight-hour day, forty-hour week; overtime pay requirements; no child labor; no convict labor; compliance at least with safety, sanitary, and factory-inspection laws of the state wherein the work is performed; and payment of at least the prevailing minimum wage in the industry as determined by the Secretary of Labor. Violators of the Act must make restitution and are placed for three years on an ineligible list to receive further Government contracts.

In July, 1936, the Board endeavored to use the same economic leverage as the Walsh-Healey Act provided. An attempt was made to have the Navy Department withhold contracts from firms refusing to comply with a Board order; but the Navy Department refused the Board's request on the ground that, under the decisions of the comptroller general relating to such matters and in the absence of statutory provision in the Wagner Act, no legal right existed for the Navy Department to withhold contracts.<sup>18</sup>

In 1937 the CIO began to clamor for legislation which would prevent violators of the Wagner Act receiving Government contracts, and the AF of L joined in the demand. In 1938, the Senate passed such an amendment, and the amendment was reported favorably by the House Judiciary Committee; but Congress adjourned before the House passed the bill. A bill in the

<sup>17</sup> 49 Stat. L. 2036. The material in this section was drawn from Smith Hearings, Vol. IV, No. 9, pp. 237-253, 256-268.

<sup>18</sup> It is interesting to note that for some five years following 1935, Navy Department contracts included a clause providing that, where contractors became involved in disputes, the Secretary of the Navy could in his discretion refer the disputes to the N.L.R.B., which was to act as arbiter or referee, "and the determination of this Board shall be final and conclusive on the parties to the contract." Smith Hearings, Vol. IV, No. 9, p. 242. This was changed in 1940 in order to provide a broader basis of power for the Secretary of the Navy.

same Congress which would have required contractors to stipulate that they would comply with Board orders received no action by either branch of the legislature. A rider attached by Senator Barkley to a defense appropriation bill in 1938, which rider would have used the contract leverage to enforce collective bargaining rights, passed the Senate but was dropped by conferees. In 1939, the Senate amended the Walsh-Healey Act so that violators of the Wagner Act would be denied Government contracts when a Board finding had been sustained by a final adjudication in a court of appropriate jurisdiction, but this bill was never reported out of the Judiciary Committee of the House. Thus, Congress consistently refused to expand the Board's compliance powers.

When Congress failed to act, Mr. John L. Lewis of the CIO attempted to induce the President to issue an executive order which would require Government contractors to comply with the provisions of the Wagner Act. The President regarded such use of the executive order to be in grave legal doubt; and he suggested instead that the proper recourse would be legislation, although legislative efforts had failed of accomplishment.

The war emergency of 1939 led to the creation of the Defense Commission. In order to expedite the flow of defense goods and at the same time to protect the gains achieved, the Defense Commission promulgated certain principles governing defense contracts. Among others, these principles emphasized the necessity of speed and recommended the use of the negotiated contract, which permitted governmental departments a maximum of discretion as contrasted with the competitive-bid contract, where lowest price was the only consideration. At about the same time was issued a statement of the Commission's unanimously adopted labor policy, which in part read that "All work carried on as part of the defense program should comply with Federal statutory provisions affecting labor wherever such provisions are applicable. This applies to the Walsh-Healey Act, Fair Labor Standards Act, the National Labor Relations Act, etc." The labor policy and the policy of the Defense Commission toward contracts were subscribed to by the President, who transmitted them to the Congress.

Because labor organizations and the press asked Mr. Sidney Hillman, representing labor on the Defense Commission, for an

answer, Mr. Hillman inquired of Attorney General Jackson as to the status of a contractor in relation to defense contracts if that contractor was in violation of a Board order. That is, did an appeal by the employer suspend the effect of a Board finding that a concern was guilty of violating the law? The Attorney General wrote Mr. Hillman that "the findings of the . . . Board that an employer is in violation of the . . . Act are binding and conclusive upon the other agencies of the Government unless and until reversed by a court of competent jurisdiction."

The Attorney General's reply was interpreted by much of the Board's opposition to mean that where the Board had found a violation, and even before appeal, contracts could be refused or cancelled because of such violation. But such an interpretation was completely erroneous. No question whatever as to the policy of awarding or withholding contracts for a violation of the Wagner Act was involved. Rather, the question was purely a legal one. The Attorney General simply said that where the Board had made a finding regarding employer conduct amounting to a violation, that finding could only be reversed in the circuit court of appeals in the manner provided in the statute and the finding could not be reversed or reviewed by other agencies of Government. The decision of the administrative agency is presumed to be valid and is to be applied until reversed; indeed, the Act itself provides that appeal shall not operate as a stay of the Board's order unless the court so orders.

It is apparent, then, that much commotion was unduly aroused. In the competitive-bid contracts, price was the only consideration; the Defense Commission used its discretion in the negotiated contracts, but the Attorney General's opinion did not affect that discretion. The Army, the Navy, or the Defense Commission was free to contract, and did so; and how or whether contractors subscribed to or violated Board orders or the Act was no concern of the Attorney General. Whether violators received contracts was purely a matter for the Defense Commission, in light of all factors and needs, to determine; hence any effect of the legal ruling depended upon how the War Department, the Navy Department, and the Defense Commission released contracts.

*Part Five*

Organization and Personnel



## Chapter XVII. THE BOARD'S WASHINGTON OFFICE

The central offices of the Board are located in Washington. The organization follows a functional outline, and major divisions may be considered.

### A. The Board

Under the law the Board is composed of three members, each appointed for a term of five years, although the original appointees were to serve for one, three, and five years, respectively. J. Warren Madden was designated by President Roosevelt as chairman and appointed for five years. Other original appointees were J. Carmody and Edwin S. Smith. The appointed chairman who was to guide the Board through its most difficult years and implement the expression of public policy was primarily a lawyer in training and experience, with almost no experience in the field of labor. The chairman was very instrumental in setting the tenor for the Board's legalistic approach.<sup>1</sup> At the end of Mr. Madden's term in 1940, Mr. H. A. Millis was appointed chairman of the Board. Donald Wakefield Smith was appointed to serve in the place of Mr. J. Carmody, who resigned in 1936. Mr. Smith was not reappointed at the expiration of his term; instead, Mr. William Leiserson, who was then Chairman of the National Mediation Board, was appointed for a five-year term, effective June 1, 1939. Mr. Edwin S. Smith was a member of the Board until August, 1941. Mr. Gerard D. Reilly was appointed a member to fill the place left vacant when Mr. Smith was not reappointed.

Charges and protests have been lodged against all members of the Board. Edwin Smith was excoriated for his views on in-

<sup>1</sup> Smith Hearings, Vol. II, No. 11, pp. 349-350. Mr. Madden, at the expiration of his term, was appointed to the U. S. Court of Claims.

dustrial unionism, which views are to be found in his dissenting opinions on the unit problem. This criticism was anchored in the division within the labor movement. Even Mr. Leiserson, with his background of labor and mediation experience, was criticized. While the critics have disagreed with the Board's interpretations, and have reasons for so doing, the Act has been administered as the Board members saw it in terms of congressional intent; and the objections raised by the labor organizations have not deterred the Board from its own view as to the Act's intent. The Act meant to create an independent agency, and the Board throughout its history has given an excellent example of independence. The pressure brought by all groups was ignored by the Board in favor of progressing with its task as the members saw it. The Board appears to have been conscientious and impartial, and this is ultimately a reflection of the judiciousness and fair-mindedness of the Board members themselves.

Throughout its first five years the Board carried a great burden of work, and this was continuing into the sixth year. Every decision rendered was considered in detail by the members of the Board. The administrative burden itself was heavy, for the Board reserved to itself the task of administering the Act from Washington rather than putting its dependence upon the regional offices. Even the personnel problems were handled by the Board when the Board was expanding most following the Supreme Court's approval of the Act in 1937. In addition to making determinations on fundamental policy matters, personnel matters, and decisions in cases, the Board heard cases two days per week. Despite the seemingly impossible schedule of work the members carry, and because the Board has given an acute ear and much attention to its public relations, the members have found time to speak before all manner of academic and professional groups who were interested in the foremost quasi-judicial agency of the day. And, perhaps more than any other administrative agency, the Board has had to work in an atmosphere fraught with the heat of emotional, social, and economic issues, aggravated and distorted not only by the groups directly at issue but also by congressmen, the press, and the lay public. Four times within the first five years the Board had to stand trial, as it were, before different congressional committees.

The first investigation came in January, 1938, when the Judiciary Committee of the Senate, under a Senate resolution, investigated the Board and its activities.<sup>2</sup> This was followed by a flood of pressure against the Congress to amend the Act, and in the following months and into 1939 the Board had to submit data and testimony to the labor committees of the House and Senate. Then came the drastic and inquiring House investigating committee, created for various purposes, which extended through 1940.<sup>3</sup> In addition, the Board each year had to run the gauntlet of the Appropriations Committee, which was an important event in certain years when the atmosphere of the committee failed to reflect support for the Board's responsibility. Not only did the Board have deep ignorance to fight on the part of the general public, but the Congress too was difficult to convince of the essential nature of the Board's work.

Toward the end of the first five years of the Board's life, effort was made to change by amendment the number of Board members from three to five. The reason for this was to be found in the AF of L's opposition to the administration of the Act, the desire to destroy the trend of the Board's interpretations, and a purported desire to bring a fresh point of view to the Board by the addition of new members. Since the Act provides that a member shall not be removed by the President except for neglect of duty or malfeasance in office<sup>4</sup> and since the Board members did not yield to the insistence from various pressure groups that they resign, the only alternative facing such groups was to enlarge the Board.

President Green voiced the desire of the AF of L:

"... I want to emphasize the necessity of considering the amendment which we have offered to substitute a five-man Board for the three-man Board. We believe that that has been made necessary, that experience has pointed the way, that Congress should change the personnel of the Board, should change the Board, should enlarge it and increase it, so that these long delays in investigations and decisions could be avoided; and we believe that a five-man Board would approximate the judicial standards that we have set for them. . . ."<sup>5</sup>

<sup>2</sup> S. Resolution 207, 75th Congress, 3rd Session.

<sup>3</sup> H. Resolution 258, 76th Congress, 1st Session.

<sup>4</sup> Appendix I, Section 3(a).

<sup>5</sup> Smith Hearings, Vol. II, No. 9, p. 287.

Many answers might be made to Mr. Green. The AF of L has no qualifications that would enable it to set "judicial standards." Neither necessity nor experience demonstrated the efficacy of a five-man Board, unless it was the refusal of the Board members to bow to the whims and wishes of each and every labor leader and organization. Certainly it was not the existence of a three-man Board rather than a five-man Board that caused delay in investigation and in that delay which was a matter of procedure and due process protections. No division of work was made by the Board in the sense that certain Board members handled certain substantive problems. Complaint cases usually involve different but related charges under the Act; and duplication would almost surely result if a complaint alleging a refusal to bargain were handled by one member and the charge of interference, restraint, or coercion were handled by another. As Chairman Madden pointed out, more delay might be involved:

" . . . I would only say that I know of no respect in which the work of the Board would be expedited by there being five men on the Board rather than three. It is quite obvious that there might be considerable delay. If you have a difficult matter to decide, the deliberation of five men upon it would necessarily take more time than the deliberation of three men." <sup>6</sup>

Certainly a five-man Board is no more able intellectually to solve the real and substantive problems facing the Board; that is, if the solution is to reflect considered and studied judgment rather than to suit the fancies of every labor organization's opportunistic pleadings.<sup>7</sup>

When in 1940 the House Labor Committee finally finished its hearings on amendments offered for the Wagner Act, after many months and nine volumes of hearings, statements, and letters, it

<sup>6</sup> Smith Hearings, Vol. II, No. 14, p. 556.

<sup>7</sup> Said Chairman Madden: ". . . The reasons advanced for proposing a board of five members are without merit. I can find no objective justification for the proposal except the desire to destroy a quasi-judicial body on the ground that not all of its decisions have been favorable to a particular litigant. I believe that such action would establish a most unfortunate precedent. It would mean that officers of quasi-judicial agencies, charged by Congress with the duty and responsibility of administering a law, would be impelled to formulate their rulings not in the public interest or with the objective of carrying out honestly and courageously the purposes of Congress, but with an eye to avoiding offense to various private groups whose interests might be affected." H. Hearings on N.L.R.A., Vol. II, p. 444.

rendered a report recommending the passage of its bill which, among other changes, would have provided for the addition of two members to the Board.<sup>8</sup> This, however, was to stave off the passage of the bill offered and recommended by the Smith Committee during its investigation, a bill which if passed would have seriously changed the Act.<sup>9</sup> A separate report objecting to the passage of the Labor Committee's bill was offered by a minority group.<sup>10</sup>

### B. The Executive Office

The executive office of the Board at one time coordinated all divisions and supervised the relationship of the Washington and regional offices. Administrative details were concentrated and routed through a central channel under the secretary and assistant secretary of the Board. That office prepared the agenda for the Board, was a liaison agency between the Board and other governmental agencies, administered the Washington office, authorized the issuance of complaints, provided follow-up of Board orders, prepared reports for all congressional committees, and, until a personnel director was appointed, handled personnel matters in the field. This mass of duties was narrowed after 1939 by the appointment of a chief administrative examiner, then by the creation of an administrative division, and finally by the organization of a Field Division and the development of a Case Clearance Unit, so that by 1941 the secretary's function was analogous to office management. The jurisdiction of the secretary covered general correspondence other than that relating to cases, supervision of the Washington clerical staff, preparation of the Board's agenda, direction of case statistics, keeping of Board records, and fiscal and budgetary duties. The field division coordinates and supervises the field offices, provides assistance for regional directors, and joins the Case Clearance Unit of the litigation section in supervising cases.

Until 1937 Mr. Benedict Wolf, who transferred from the first National Labor Relations Board, was secretary of the Board.

<sup>8</sup> The bill was introduced by Mrs. Norton, Chairman of the House Labor Committee—H.R. 9195, 76th Congress, 3rd Session.

<sup>9</sup> H.R. 8813, 76th Congress, 3rd Session.

<sup>10</sup> H. Report 1928, Part 2, 76th Congress, 3rd Session.

When he resigned, Mr. Nathan Witt was made secretary as of November 11, 1937. When Mr. Witt was appointed secretary, that office demanded legal knowledge, labor knowledge, and administrative talent. Later there were intra-Board differences of a pronounced character regarding the "administrative ability" of Mr. Witt, who resigned following the departure of Mr. Madden from the Board.<sup>11</sup>

### C. The Economics Division

The five functions of the economics division may be outlined:<sup>12</sup>

1. The collection and analysis of data for questions of jurisdiction. In its early years, when the Board was following such industries as steel, clothing, fruit, shipping, etc., the economics division spent most of its effort on areas which had always been thought to be under interstate commerce; but as the Board established jurisdiction in the old areas, it extended its operations into other fields of industry which might be referred to as borderline cases of jurisdiction, such, for example, as banking, insurance, or the dairy industry.

The actual work of the division in establishing jurisdiction was not difficult where the employer was ready to furnish information. But it was often necessary for the division to rely upon reports made for the S.E.C. or to ascertain the flow of raw materials and finished products through the informational channels of the Department of Commerce.

<sup>11</sup> In testifying before the Smith Committee, Chairman Madden said in part with regard to Mr. Witt:

" . . . Mr. Witt was in Mr. Carmody's time the Assistant General Counsel who headed up the Review Division. The training and development of the people who came into the Review Division, many of whom were young, practically all of whom were unfamiliar with administrative law as such, whatever legal practice they had had was common law practice—it was Mr. Witt's task to teach them how to do their work. I suppose Mr. Carmody had reference to this, too, that the building of those records which went to the Supreme Court of the United States and which culminated in the decisions of April 12, 1937, in which the basic constitutionality of the Act was sustained, was a master job; a better piece of legal work has not been done, and the Review Division in that time had a very considerable part in the orderly and convincing marshalling of that material. And so everyone regarded it as a perfectly splendid job." Smith Hearings, Vol. I, No. 2, p. 418.

Board member Leiserson recommended repeatedly that Mr. Witt be relieved of his duties on the grounds of incompetency. Members Madden and Smith refused on the grounds that incompetency had not been shown. Chairman Madden demonstrated confidence in Mr. Witt and produced ample encomia to support his judgment. Smith Hearings, Vol. II, No. 12, pp. 407-418; Vol. II, No. 13, pp. 530-541.

<sup>12</sup> N.L.R.B. Press Release Z-808.

2. The study of labor relations. Such study was concerned with personnel policies and collective-bargaining procedures. A knowledge of trade unionism and collective bargaining was essential for the work. The studies covered labor policies and included espionage and strike-breaking. The information which the division furnished was requested by all groups within the Board, often before the complaint was issued by a regional director.

3. The determination of back pay and reinstatement. Where a Board decision found discrimination and a Board order relieved through awarding back pay and reinstatement, there arose a major problem of ascertaining the back pay and evaluating "substantially equivalent employment."<sup>13</sup> This work was done almost totally in the field; the employer's books constituted the source of the statistical data with which the division in such cases usually worked. Alleged discrimination charges were also reviewed by the division in an attempt to ascertain, for example, whether a discharge was nondiscriminatory in character or whether it was based on unionism. If many persons were involved, an analysis of the employment record was of value, for as the number grows the statements of different sides become confusing and contradictory.

4. The study of the effects of the N.L.R.A. and of Board records. The division was especially interested in compiling data designed to show the effect of the Act and the Board, especially as relating to industrial peace; hence the strike-activity record was given major attention. This was a reflection of the preamble of the Act, which sets up the reduction of strikes as one of the major objectives. Too, the division made studies of written trade agreements. The studies, which are of a statistical character and which relate to such matters as trade agreements and strike activity, make use of statistics gathered by such organizations as the United States Bureau of Labor Statistics. The statistics, along with other material which is thought to be authoritative and available, are compiled and interpreted. The division also compiled statistics as to the Board's activity in terms of the cases filed, number of workers involved in cases, how the cases were disposed of by the Board, cases pending, the number of elections and their results, and other data that is really of an administrative nature for the purpose of Board management.

5. The provision of reference, editing, and administration. The reference section not only served the division itself, as was contemplated, but it also served other divisions of the Board. The section

<sup>13</sup> The magnitude of the task is clear in such a case as the *Republic Steel* case, where 10,000 men were affected.

furnished studies and mimeographed material to students and others interested in the whole problem of collective bargaining and its processes. For the various divisions of the Board, the division often operated as a dictionary. This service was relied upon especially by the review division, the litigation division, and the trial examining division whenever terminology was met with where a training in labor economics would have been useful. Factual information that is denominated as "common knowledge," and to which the courts give judicial notice, was often furnished to these same sections. Important statistical data were furnished to various investigating committees.

The review division especially found the economics division of important assistance in three different situations.<sup>14</sup> (1) When material was already in the record, such as in a discrimination case, the review section used the talents of the division in going through the employment records to determine whether there had been a violation. (2) The division rendered expert advice on labor relations, such as the interpretation of collective-bargaining contracts. (3) The division produced material of which the Board could take judicial notice, such as labor facts, population statistics, or industrial facts. Although it has been charged that such reliance upon the division by the Board and by the review section meant that the Board was going outside the record when making a decision, the Board's defense was that the review section, and in turn the Board, may take cognizance, or judicial notice, as do the courts, of facts which are pertinent.<sup>15</sup> Indeed, the courts have, with the Board, carried on the "Brandeis Brief" economic approach.

Most striking evidence of the importance of economic data for the Board's cases, both because of the interstate commerce aspect and the collective-bargaining aspect, is to be found in the *Jones & Laughlin* case. That case, which saw the Supreme Court recognize the interstate commerce aspects of manufacturing, is probably regarded as the most important Supreme Court decision of all the Board has brought, if not of all cases in the last decade. The economics division, under the supervision of the chief economist, prepared the material to show the interstate aspects of the

<sup>14</sup> Smith Hearings, Vol. III, No. 6, p. 231.

<sup>15</sup> *Ibid.* Also see p. 209. Chairman Madden regarded much of the work of the division as of the type the Board itself could do, given time.

employer. The decision took cognizance of such offered data, which showed the need for collective bargaining.<sup>16</sup> The division also furnished data for the other four cases decided the same day and for later cases coming before the Court. The Circuit courts, too, took cognizance of data furnished by the division.

The Act prohibits the Board's appointing individuals "for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor."<sup>17</sup> This provision was seized upon as a reason for attack by certain groups who desired a revision or abolition of the Act and Board. The economics division was charged with duplicating the work of the Department of Labor. Dr. Isadore Lubin, of the Bureau of Labor Statistics, testified before the Smith Investigating Committee that the Board did not duplicate the work of the Bureau, although it was true that the division did use statistics collected by the Bureau. The Bureau regards its task to be that of collection of data, not their interpretation; and since, argued Mr. Lubin, the Board's economics division was chiefly concerned with interpretive work, then it surely would require economists to interpret the statistics the Bureau made available. It was made clear that, in certain instances where the Bureau had collected certain data for the division, it had financially charged the economics division for the service.<sup>18</sup> Nevertheless, opponents of the division publicized the "duplication of activity" the Board economists were said to be engaged in, and in addition the label of "communistic" was attached to the division. This opposition was pronounced when the Appropriations Committee, in considering the appropriations for the year ending June, 1941, not only objected to the existence of the division but, in reducing the Board's appropriations, stated in its report: "It is felt, however, that no need exists for a division of economic research, and it is expected that this section will be entirely eliminated."<sup>19</sup>

<sup>16</sup> 301 U. S. 1 (1937).

<sup>17</sup> Appendix I, Section 4(a).

<sup>18</sup> Smith Hearings, Vol. III, No. 6, pp. 208, 228.

<sup>19</sup> Congressional Record, unbound edition, 76th Congress, 3rd Session, pp. 5514 ff. The Smith Committee likewise recommended that the division be abolished. H. Report No. 1902, 76th Congress, 3rd Session, p. 37. The Appropriations Committee reduced the Board's requested \$69,000 for the division by the amount of \$45,600.

The action of the Appropriations Committee provoked an important congressional discussion. The supporters of the Board argued not only that the Board had need of the economics division, but that if an Appropriations Committee's recommendations on Board divisions had to be followed, the tripartite division of powers would be destroyed. The legislative would be cutting across the administrative. No agency can easily ignore the recommendations made by an Appropriations Committee when the recommendation is accompanied by a reduction in the appropriation, for if the division were not to be removed, the following year another deduction presumably could be made and the logical end to such a process would be no money appropriated. Board member Leiserson, who was regarded with respect by many congressmen, gave his opinion regarding the economics division:<sup>20</sup>

1. The work of the Board would be handicapped without the aid of the economics division.
2. Reorganization should not cut off the economics division but should change Board administration so it would be less heavily weighted with lawyers. More men should be used who had been trained in administration, economics, and labor relations; that is, more economists were needed, not fewer.
3. The work of the economics division was said to be increasing because cases were getting more complex. Representation cases were said to be increasing. No other governmental agency was equipped to supply the Board with the type of economic information it needed.
4. The Board, wrote Mr. Leiserson, was not primarily a prosecuting body; the statute is remedial, not penal. The Board only finds facts and orders remedies, and hence research is essential. The presence of the economics division would tend to keep the Board an investigating body and remove some of the prosecuting character of the body.
5. The reduction in the number of trial examiners was congressional emphasis on the idea of prosecution rather than fact-finding and investigation. What was needed was more and better-trained trial examiners and more and better intermediate reports by the trial examiners. To reduce the appropriations for the trial examiners would be a step backward, for it would hamper the development of the intermediate report into a more useful instrument.

<sup>20</sup> In a letter to Rep. Murdock, reproduced in Congressional Record, *Ibid.*

Despite the reliance placed upon Dr. Leiserson, the evidence offered by the Board, the charge that the Appropriations Committee was doing by indirection what it could not do directly in that it would change existing law through reducing the appropriations, the Appropriations Committee's recommendation was supported by the House of Representatives. A partial reason for such support may have been that the House was aware that the economics division, through the economic briefs, had, at least in the early days of the Board, been extremely important. But it does not appear plausible that the House, if it were attempting to reduce the power of the Board, would approach through the interstate-commerce angle, for by 1940 the jurisdiction of the Board had been established in most of the major fields of industry. An impartial view of the function of the economics division must conclude that its work would of necessity be done by someone, whether it be the Department of Labor, in which case the cost would be charged to the Board, or by other persons working for the Board but not labeled economists. Actually the work was done by labor economists, who were under civil service. As of February 15, 1940, the division was composed of one chief economist, one senior industrial economist, one industrial economist, three associate economists, four assistant economists, three assistant economic analysts, four junior economic analysts, one supervisor of case statistics, seven clerks, two clerk-stenographers, two stenographers, and one typist.

David Saposs, who was the chief economist, is one of the better-known labor economists of the United States. Fully conversant with the history of labor not only in the United States but throughout the world, Dr. Saposs was made chief economist by competitive examination in 1936. The Civil Service Commission described the position as follows:<sup>21</sup>

1. To direct and conduct research and furnish the Board with full data for 9(b) cases. The data and recommendations were to be based upon the background of labor relations and the labor groups involved. Section 9(b) gave the Board the power to determine the appropriate unit.

<sup>21</sup> Smith Hearings, Vol. III, No. 2, pp. 70-71. Eighty-three applicants entered the examination, seventy-eight of whom qualified. Dr. Saposs was first on the list.

2. To testify when necessary on pertinent facts in the history of industrial relations in the industry in which a particular case had arisen, and to indicate the interstate-commerce aspects.

3. To develop general economic data on the extent of strikes and their causes for inclusion in briefs to be filed before courts.

4. To conduct general studies as might be necessary in connection with reports to Congress on the type and nature of cases, together with the economic tendencies thereby revealed.

5. To conduct and direct assistance in conducting research into questions of corporation finance and marketing as related to interstate commerce.

One of the long-time opposition arguments against industrial unionism is that such a labor movement is communistic, and the "one big union" idea has always been feared by those who believe in the "rugged individualism" type of economic organization. Fearful of such a thought and relying upon the extensive use of short excerpts from the writings of Dr. Saposs, the Smith Committee related Socialism, Saposs, Board Policy, and the destruction of the capitalist system. The Committee wrote in part:

"That a person of such definite socialistic leanings as Saposs has demonstrated himself to be in his writings and affiliations should occupy a policy-making position of trust and importance in a government committed to the preservation of the capitalist system of private enterprise appears but another exemplification of indiscreet personnel management by the Board as well as furnishing another strong indication that the Board's policies are tinged with a philosophical view of an employer-employee relationship as a class struggle, something foreign to the proper American concept of industrial relations. Saposs testified that he was never consulted by the Board with regard to matters of policy other than the internal policies of his particular division.

". . . It becomes evident that the Board policy in the determination of the appropriate bargaining unit is influenced to a very considerable degree by Saposs." <sup>22</sup>

<sup>22</sup> H. Report 1902, 76th Congress, 3rd Session, p. 36. Criticisms of like character came from the floor of the House.

Senator Wagner has said:

". . . The real basis of the House objection [to the economics division] was the individual who heads the particular division, David J. Saposs, because of some radical economic or social views he is alleged to hold. He vigorously denies hold-

In addition to the alleged communistic and industrial-unionism leanings as a basis for opposition to the economics division, the Smith Committee also, relying upon the statement of the official duties of the chief economist as set forth by the Civil Service Commission, held that the Board's use of the chief economist as an expert witness for the Board made worse the basic unfairness of Board procedure:

"The record discloses that Saposs is employed to hold himself in readiness to supply, through himself or his staff, so-called expert testimony on any subject, at any time and in any case which the Board feels needs bolstering. It will thus be seen that the United States Circuit Court of Appeals in the *Inland Steel* case when it condemned the Board, as 'prosecutor, judge, jury, and executioner,' neglected to mention that the Board through Saposs and his assistants also acts as its own 'witness' in producing evidence upon which it bases its findings, which are conclusive and not subject to judicial review."<sup>23</sup>

This use by an agency of its own highly trained employees, who are experts and specialists, is not unique with the Board. Different governmental agencies often use such testimony. Even if it were unique, it would not do violence to the basic fairness of the Board's procedure, for, to repeat, the use of the quasi-judicial agency is to enable expertness and dispatch that is not possible in the courts. And while it is true that the evidence offered by the Board's own witness is conclusive upon the court, it may be pointed out that the employer, too, may produce testimony from expert witnesses.<sup>24</sup> The validity of any criticism would not rest upon the government introducing its own witnesses as a party litigant, even if they be employees of the agency, but rather would rest ultimately upon the basic justice of the administrative

ing such views. The House Committee felt that he ought not to be employed, and not being able to bring any other grounds for his removal, the Committee abolished the division which he headed in order to get rid of him." Congressional Record, unbound edition, 76th Congress, 3rd Session, p. 19729.

<sup>23</sup> *Ibid.*, pp. 33-34. Through March, 1939, the Board had introduced expert testimony in twenty-two cases. Dr. Saposs or another economist from the division was the expert witness in all such cases. The Board had also called in such authorities as John Fitch, William Leiserson, Edward Berman, Sumner Slichter, Otto Beyer, Paul Brissenden, and Matthew Woll. Smith Hearings, Vol. II, No. 2, pp. 66-68.

<sup>24</sup> For example, professors of Industrial Management are sometimes called to testify on employer-employee relationships.

process in its entirety. And finally, the courts have viewed favorably the use of the expert witness by the Board. In the case of *N.L.R.B. v. The Griswold Manufacturing Co.* the court said:

"Brief mention may be made of the respondent's complaint that there was 'prejudicial use of incompetent, irrelevant and immaterial testimony.' Particular objection was expressed by the respondent against the admission of the testimony of David J. Saposs, chief economist for the National Labor Relations Board, who was called as an expert by the petitioner. His testimony was on the subject of the 'process of collective bargaining.'

"There is no merit to this objection.

"In *National Labor Relations Board v. Pennsylvania Greyhound Lines Inc.*, . . . Mr. Justice Stone, in a footnote, cited numerous experts and textbooks 'on the significance of recognition of collective bargaining.' One of the expert authorities cited by Mr. Justice Stone was the 20th Century Fund, Inc. Mr. Saposs was a research associate with the 20th Century Fund, Inc. Nothing further need be said on this score."<sup>25</sup>

The attack upon the economics division by the Smith Committee and the Appropriations Committee goes far beyond the confines of the Board and relates to the whole administrative process inasmuch as the relationship of the legislative and the administrative agency is involved. Dean Landis has pointed to the necessity of a close relationship between the legislative and the administrative agency because from the legislative emanate policy and supply.<sup>26</sup> But the experience of the Board indicates that generalizations risk becoming standardized error when placed against the backdrop of independent action by the administrative agency once the public will has been expressed by legislation. For here is the demonstration that one may argue for the complete independence of the administrative agency from the legislative except as legislative statutes and resolutions clearly, unequivocally, and as a result of full congressional action change the scope, status, or power of the administrative agency. It is true that the administrative agency should be responsible to the Congress, for it is the legislative which formulates, upon the basis

<sup>25</sup> 106 F. (2d) 713, CCA-3.

<sup>26</sup> James M. Landis, *The Administrative Process*, Yale University Press, pp. 60-61.

of ultimate responsibility to the electorate, the public policy; but such responsibility by the administrative gives to the legislative no license to modify or change the expressed will except through statute.

In point, the Board and its relation to the Congress through the Appropriations Committee may be considered. The Committee suggested that the Board abolish the economics division and went so far as to recommend the reduction the Board was to make in the allocation of funds for the economics division. Should the administrative agency have proceeded upon the basis of suggestion or upon the basis of the statute which gave it power? The Board chose the latter alternative. It reasoned that respectful attention should be given to the suggestions made by the Congress but that it should proceed under the statute until that statute was changed. This determination brought a letter from the Chairman of the Subcommittee on Labor of the Committee on Appropriations, despite the fact that the Act which actually appropriated the funds did not allocate resources as between Board divisions. The Chairman of the Committee wrote Chairman Madden, pointed out the will of the Committee, and concluded:

"It is therefore the expectation of our Subcommittee that the direction given in the Committee report shall be carefully followed in good faith. I would like to be promptly advised regarding whether this is being done."<sup>27</sup>

There would surely have been a point of order raised if the Appropriations Committee had included in the Appropriation Act a specific direction that the economics division be abolished, for that would have violated the tenet that no legislation should be enacted as part of an appropriation bill; yet the committee report made the attempt to change the operation of an administrative agency.

The Board must receive credit for exposing, by its position, the danger that attaches to the relationship of any administrative agency to the legislative. Apart from the searching question that one might raise in this particular instance regarding just who it is that legislates, the Board has made it clear that an administrative

<sup>27</sup> Smith Hearings, Vol. IV, No. 1, pp. 7-8.

agency must be governed by the statute and not by suggestion. For suggestions may come from congressional groups who represent special interests and whose policies thereby become effective when the studied judgment necessary for statutory change is absent. And if one must choose between reduction in supply from the legislative as a result of a refusal to follow special interests and no reduction in supply if the agency follows the special interests, then let the agency choose that course which will be the symbol of intelligence and participation in government. This the Board did.

On June 29, 1940, the name of the division was changed to technical service division. This change was made on the grounds that the new name more accurately described the activities of the division. The activities remained almost unchanged, although research activities not directly related to cases were dropped. The Board's action in changing the name brought severe criticism, and it was said to be "clear to anyone with a grain of common sense that this name change was purely an evasion of an act of Congress on the part of the Labor Board."<sup>28</sup> Despite the fact that the CIO, the AF of L, independent unions, and others supported the economics division, when the Congress passed a deficiency bill in October, 1940, the House of Representatives included a provision which specifically abolished all personnel and functions of either the technical service division or the economic research division. Because the Wagner Act provides that an annual report must be made to the Congress and to the President and because records had to be kept, the House provided that no more than \$3200 per annum might be spent for that purpose. When the appropriation measure went to the Senate from the House, Senator Wagner introduced an amendment to the House action. His amendment did not disturb the \$3200 limitation, and he permitted the division to be abolished. But his amendment clearly stated that the functions, and salaries in support thereof, formerly carried on by the economics division or the technical service division, were not to be abolished and could be maintained by the Board. Senator Wagner and other senators were concerned over the possible destruction of the

<sup>28</sup> Smith Hearings, Vol. IV, No. 1, p. 4. This was charged by Rep. Routzohn, a member of the Smith Committee. See pp. 1-16 for material on the name change.

statutory right of the Board to ascertain interstate-commerce facts or to discover the facts for such matters as reinstatement and back pay. The Senate passed the Wagner amendment, it was accepted by the conferees of the House, and later the House adopted the amendment. The Senate, after the deficiency bill was enacted, was well aware that it left full statutory authority for the Board to perform the functions formerly carried on by the economics division; but even after the House accepted the Wagner amendment and passed the deficiency bill, many House members thought the Senate amendment had abolished both personnel and functions of the economics division.<sup>29</sup>

In light of the deficiency bill,<sup>30</sup> the Board abolished the economics division on October 10, 1940. Of twenty-five employees, nineteen were transferred to other divisions within the Board where they would presumably carry on "economic" functions. Six employees, including Dr. Saposs, transferred to other departments of the government, resigned, or their services were terminated.<sup>31</sup>

#### D. The Publications Division

The publications division, sometimes referred to as the information division, presumably functions to furnish information to the public on the Board's activities but not to promote the Board. Under a director of information, the division answers inquiries on cases, condenses decisions, prepares material for speeches and articles, maintains a general information service.<sup>32</sup> Chairman Madden regarded one of the foremost tasks of the Board to be education of the public as to the work of the Board, although it is extremely difficult to distinguish promotional activity from education. Before the Appropriations Committee on March 1, 1940, the Chairman of the Board said:

"I think that somehow or other we have failed to make the public understand what we do and why we do it. There is a very general

<sup>29</sup> Congressional Record, unbound edition, 76th Congress, 3rd Session, pp. 19713, 19728-19730; 19828; 20179-20180.

<sup>30</sup> Public No. 812, 76th Congress, 3rd Session, 1940.

<sup>31</sup> Smith Hearings, Vol. IV, No. 10, pp. 277-278; 293.

<sup>32</sup> H. Hearings, Independent Offices Appropriation Bill for 1939, 75th Congress, 2d Session, pp. 729 ff.

ignorance throughout the country of that although there is great curiosity about the Labor Board. These people that we have can do no more than merely make a dry resumé of the decisions of the Board and their time is occupied with that necessary and fairly routine work.

"I suppose if we were able to do [as] some other departments do, to make the public understand more in the way of self-advertising and that kind of thing, perhaps our work would be better understood."<sup>33</sup>

The Chairman's testimony should not be interpreted to mean that the public is devoid of all information and has no possibility of getting information. Mailing lists are maintained in the information division and formerly were used in the economics division. Persons interested in Board work can obtain ample material which the Board sees fit to release. Mimeographed material of a statistical nature, as well as court cases, Board decisions, policy changes, strike activity, strikes prevented, and collective-bargaining information is available to those who apply. Whether the Board desired to promote or not to promote itself in the eyes of the public doesn't really matter in light of the history, for even if the Board had promoted itself it is difficult to see how it could have overcome the overwhelming lack of understanding regarding the Board and its work. The misunderstanding was generated and circulated by the press, the AF of L, the groups "professionally" anti-Board and anti-labor organizations, and certain congressmen. The analyses made by professors of labor economics, by deans of the better law schools, by the congressmen supporting the Board, all attempting to approach the problem rationally, made small imprint upon the opposition generated. And the Board chose to answer vilification and misrepresentation with facts and its record, and such a defense is not generally appreciated.<sup>34</sup>

<sup>33</sup> H. Hearings, F.S.A. Appropriation Bill for 1941. 76th Congress, 3rd Session, Part I, p. 585.

<sup>34</sup> Chairman Madden has said that the press gave the Board such publicity that the workers came to believe that the Board can do many things for them that the Board has no power to do; and hence the Board gets troubled with much that it shouldn't be bothered with at all. The newspapers, the chairman pointed out, kept up a drum-fire calling for repeal of the Act and agitating employers to oppose the Act; and this did not aid in the reduction of the Board's burden. H. Hearings, Independent Officers Appropriation Bill for 1940, 76th Congress, 1st Session, p. 1573. By 1940 employees were bringing charges on all sorts of things, ranging from a broken leg to a discriminatory discharge that occurred in 1928!

### E. The Personnel Division

Prior to the establishment of a personnel division, the secretary of the Board had general supervision of the personnel, handled applications and dealt with endorsers, recommended salaries, managed transfers, regulated training, received complaints regarding personnel, and negotiated with organized Board groups and handled their grievances.<sup>35</sup> When one considers the other tasks the secretary performed, it is understandable that the secretary and assistant secretary recommended to the Board early in 1939 that a personnel division be created and a director of personnel be obtained through the Civil Service. The Board for several months dealt with the proposal; and beginning November 1, 1939, four years after the Board began its work, a personnel chief was obtained.

This action by the Board represented a move on its own choice and was not related to the general move made by the President to improve the personnel service in many independent agencies. Under Executive Order No. 7916 of June 24, 1938, the President ordered the establishment of divisions of personnel and management in certain independent agencies. In an Executive Order, No. 7975-A, dated September 20, 1938, the President designated the agencies to comply but did not include the Board. The executive order became effective February 1, 1939, and since the Board early in 1939 began to consider instituting a personnel division, the move may not have been unrelated, although ostensibly the prime purpose was to relieve the burden for the Board and its officials.

### F. The Legal Division

The legal division of the Board is under the general counsel. When one has regard for the tremendous amount of litigation with which the Board is confronted and the caliber of the opposi-

<sup>35</sup> Four different unions were once to be found among Board employees: The Trial Examiners' Ass'n.; The N.L.R.B. Union; Lawyers' Union of the N.L.R.B.; Field Examiners' Union of the N.L.R.B. None was affiliated with national organizations. By 1941, two unions existed: The Trial Examiners' Ass'n. and the N.L.R.B. Union.

tion, it is apparent that the Board's existence and judicial poise are a reflection of the legal guidance it receives. Mr. Charles Fahy, who was legal counsel for the first five years, came at the time of the Board's organization at the invitation of the previous general counsel, who desired to return to Harvard. Mr. Fahy's reputation is based on his ability as a scholar; and there is a general belief among lawyers and nonlawyers, the judiciary, and unions that Mr. Fahy and Mr. Watts, who was associate general counsel and a court trial specialist, made for a legal combination that had few superiors. When Mr. Fahy became Assistant Solicitor General of the United States in 1940, Mr. Watts was made general counsel for the Board.<sup>36</sup>

The legal division is divided; one part is the section overseeing litigation and supervising the regional legal work; the other section is for review and case analysis.

### 1. *The Litigation Section*

The litigation section is subdivided into the enforcement section and the trial section, each under an assistant general counsel.

The responsibility of the enforcement section is to prepare cases for enforcement, or review, in the circuit courts of appeal or before the Supreme Court. The work is primarily the preparation of briefs and, of course, the arguing of cases before the courts.<sup>37</sup> The enforcement section also includes the Compliance

<sup>36</sup> Chairman Madden, testifying before the Smith Committee, said in part regarding Dr. Leiserson's statement that a procedure developed by Mr. Fahy was "stupid nonsense":

" . . . I want to say here with much emphasis that when a legal document prepared and submitted to the Board by Mr. Charles Fahy, General Counsel of the Board, is characterized as 'stupid nonsense,' it seems to me that it does nothing except convict the person who so characterizes such a document of reckless and intemperate statement. I have been dealing with Mr. Fahy for some four and a half years. I will say here that I don't believe that there is any more competent lawyer in the United States, either in or out of the government, and that I have never found any of his products to be remotely close to being 'stupid nonsense.'" Smith Hearings, Vol. II, No. 12, pp. 415-416. The members of the bar, as legal technicians and craftsmen, seem to have shared this view even when opposing the General Counsel in a case.

Mr. Toland, Counsel for the Smith Committee, said of Mr. Watts: ". . . I have known him well and intimately. I think the records will show my own conclusions as to his legal ability. To my mind, he is one of the most capable trial lawyers in Government today. He is a very fair and honorable gentleman." Smith Hearings, Vol. III, No. 6, p. 213.

In October, 1941, Mr. Fahy was appointed Solicitor General of the United States.

<sup>37</sup> As of February 28, 1940, there were thirty-five attorneys used in enforce-

Unit, which is a specialized group to work on compliance with court decrees and Board decisions.

When a case is going to litigation, either as a result of a Board determination to petition for enforcement of its order or as a result of a respondent's petition for court review, the case is assigned to a staff attorney; and at the same time a supervisor is allocated to the case. A date is set on which the brief is returnable to the assistant general counsel, who reviews it prior to filing with the court. Technically, the Solicitor General of the United States carries the final responsibility for the preparation of the Board's cases in the courts; but in fact the great portion of the work is done by the enforcement section, and the solicitor general's staff only reviews the prepared case a short time preceding the date set by the court for the filing of the brief.

Of first importance for the trial section is the supervision of the work of the field attorneys. The section also includes the case clearance unit, and requests for complaint authorizations may go to the unit for investigation of merit questions or jurisdictional issues. The trial section advises and makes suggestions to the regional offices on proceedings. Cases tried in the field must be cleared through the trial section; and in this manner the trials have been improved through better preparation, narrowing of issues, and proper selection of issues.

## 2. *The Review Section*

The important persons in the review section are the supervisors, and they are selected on the basis of their competence and experience. It is the supervisor who checks the draft of the decision when it is prepared, who adds the "polish," who develops uniformity in presentation, and who develops the presentation of decisions so that they are impressive legal conclusions when offered in court as the basis of a Board order. The supervisor trains the review attorney and oversees the review attorney's work by checking the attorney through reading of the pleadings, the exceptions, the briefs, and the intermediate reports. The

ment. By May, 1941, the Board was using forty-six attorneys in the enforcement section and requesting Congress for funds to add seven more in order to meet the enforcement burden. See Smith Hearings, Vol. III, No. 6, pp. 198-200; H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, pp. 540, 548-551.

supervisor and the attorney discuss the various issues presented by a case; and the supervisor, if in doubt, may also read portions or all of the case. Together with their supervisors, the review attorneys constitute the judicial secretary of the Board. The tasks required of review attorneys demand persons who can do the work of analyzing, digesting, and comparing the record with the intermediate report rendered by the trial examiner; and the foremost qualification is mental ability reenforced by habits of work. Law-school training is likely to develop the proper qualifications. Courtroom and trial experience is not a prerequisite for the work, which is comparable to the type of work done by young attorneys who are secretaries for judges; but heavy criticism has been brought against the review section because of the youth and absence of trial experience on the part of the attorneys.<sup>38</sup> Too, criticism has been brought against the social views of the attorneys in the review section, perhaps the epitome of such criticism being voiced by the counsel for the AF of L: "They . . . are part of a quasi-revolutionary movement to bring labor into its own, so as to say, and they are imbued with a philosophy and they endeavor to draw their decisions in that way. The *Serrick* case is a typical case of that kind of philosophy."<sup>39</sup>

It is true that the review attorneys were young men. The average age early in 1940 was between twenty-nine and thirty years, although the discrepancy in age between attorneys for the Board and other attorneys doing similar work in comparable agencies was certainly not pronounced.<sup>40</sup> In any event, the important qualification is not the age of the attorneys but their ability, for primarily they operate as legal craftsmen. The attorneys do not render the decisions, and whether or not they are quasi-revolutionary seems important only as a publicity prod. The Board must carry the responsibility for the decisions made; and even if the review attorneys did render the decisions and if the decisions were quasi-revolutionary, the Board itself still must

<sup>38</sup> See Vol. I, Smith Hearings.

<sup>39</sup> H. Hearings on N.L.R.A., Vol. III, p. 1113. The Supreme Court later sustained the Board in the *Serrick* case.

<sup>40</sup> Those doing similar work for the S.E.C. averaged twenty-nine years of age later in 1939; the average age of the attorneys with the Railroad Retirement Board was between thirty and thirty-one late in 1939. The average age of an agency's legal staff is likely to be a function of the age of the agency. Smith Hearings, Vol. II, No. 14, p. 561.

be prepared to accept the repercussions. In this light, the evidence indicates little basis for strong criticism.

A perusal of the qualifications of the review attorneys is impressive for the formal distinctions that are ordinarily bestowed by educational institutions as recognition of merit. Of the supervisors, almost all attended the reputable and traditionally excellent law schools. In addition, most of them had experience prior to coming with the Board, either with private business firms in the practice of the law, or in governmental work. The biographies of the supervisors reveal a heavy assortment of such distinctions as *cum laude*, *magna cum laude*, *Phi Beta Kappa*, Order of the Coif, J. D. degrees, degrees with distinction, and scholarships awarded on a merit basis. The other review attorneys, while not generally on as high a plane of qualifications as the supervisors, had a liberal sprinkling of experienced attorneys, as well as persons who won honors in their college and law work, who received fellowships, who were distinguished at graduation, and who were cited with honors.<sup>41</sup> These qualifications often indicate a substitute sought for experience; for if the Board were to get *able* and *experienced* attorneys with trial experience, much higher salaries would be necessary to induce them away from a lucrative practice. Perhaps trial experience would be an asset in that it would enable the review attorney better to analyze a case; but if the Board, because of financial stringency, could not have both mental ability and experience, the Board appears properly to have chosen ability. The court record, which would be a test, substantiates the Board's choice.

This conclusion does not mean that the Board has not erred in its selections. There have been weak spots in the section, but the section has improved constantly. Not only are cases coming through the review section faster by reason of more experience and better records, but also the weaker attorneys have been removed. Despite the drudgery and confinement of review work and despite, too, the fact that at times some of the members of the section have been but twenty-two years of age, and giving consideration to the fact that the Board has, for whatever it may mean, in a few instances hired young attorneys who had law degrees but had not yet passed the bar examinations, still this im-

<sup>41</sup> The biographies appear in Smith Hearings, Vol. III, No. 8, pp. 345 ff.

portant section merited the respect of the chairman and of the general counsel:

"I suppose that the group that I personally know best are the lawyers in the Review Division, because they are the ones who appear most frequently before the Board for conference. I want to say without qualification, with reference to these lawyers in the Review division, that I don't believe it possible for any agency of Government operating within the limitations of budget and salary within which we operate to secure a group of persons who, on the whole and on the average, are more technically competent and more high-minded and loyal to the service of the public than this group of Review attorneys."<sup>42</sup>

#### G. The Trial Examiners Division

In September, 1935, as the present Board was being organized, Mr. George Pratt was made regional director at Kansas City, where he served until he was appointed chief trial examiner in 1937. There was no chief trial examiner while Mr. Benedict Wolf was secretary of the Board, and the general functions of the office were carried on by the secretary's office. How much separation of function there was is difficult to estimate, although the Board has always endeavored to keep the trial examining section clear of other sections. After Mr. Witt was made secretary of the Board, the chief trial examiner's office was created, although the chief trial examiner continued until late in 1939 to report to the Board through the secretary's office. In 1939 the Board recognized that the chief trial examiner in fact had functioned independently of the secretary's office in everything but name since 1938, and the chief trial examiner was made directly responsible to the Board.<sup>43</sup> This change by the Board may have been brought about as a result of a desire to promote a separation of functions, or it may have been a recognition that the secretary's office was overburdened, or both; but the step was desirable and a separation was made in order to improve organization.

The advent of a separate division for the trial examiners brought an earnest attempt to improve the functioning of that group as individual cogs in the Board machinery. The potential

<sup>42</sup> Chairman Madden before the Smith Committee, Vol. II, No. 12, p. 401.

<sup>43</sup> Smith Hearings, Vol. II, No. 4, pp. 105-106; Vol. II, No. 5, p. 140.

importance of the intermediate report and the actual deficiency in the report throughout most of the Board's early years have been indicated. Traditionally, the one who hears and sees the witness is the one whose evidence bears the most weight. This principle recognizes the fallibility of judges attempting to render a decision from the cold record. Because the trial examiner is, to the public, the first court of labor relations and because, too, the intermediate report carries great potential importance, is the basis of the Board's decision, and is often complied with by the employer, it is necessary that the trial examiners be persons of capability and experience—a necessity to which the Board, especially since 1938, has given formal recognition.

Prior to December 1938, the Board made use of per diem trial examiners.<sup>44</sup> Such a system is not common among administrative agencies, although it could not be said to be uncommon in that agencies sometimes use special examiners of certain types.<sup>45</sup> The Board, however, relied more upon per diem trial examiners than upon regular men until it decided in July, 1938, that the system was unsatisfactory; action was taken in September of that year to institute a system of regular and full-time trial examiners, although some per diem examiners were used through December, 1938.<sup>46</sup> The per diem system was found unsatisfactory because of the inability to obtain properly qualified persons when needed; the per diem examiners did not devote their full energies to the cases; often the persons serving were unable to read the record and still less able to write a report; minute supervision was necessary; and the experience of all quasi-judicial agencies had indicated to the Board that a staff of its own trial examiners, permanent, regular, and full-time, was desirable. Close association

<sup>44</sup> Especially in the South and West. Only four regular and permanent trial examiners were used in 1938. Even then the Board realized that the per diem system would need to be abolished when funds made it possible. H. Hearings on Independent Offices Appropriation Bill for 1938, 75th Congress, 1st Session, pp. 177 ff.

<sup>45</sup> The National Mediation Board sometimes uses persons roughly comparable to the trial examiner. The S.E.C. ordinarily uses no per diem examiners, although it assigns attorneys from the Commission. The Maritime Commission and the Federal Trade Commission use no per diem examiners. Smith Hearings, Vol. II, No. 5, p. 141.

<sup>46</sup> In July, 1938, the Board had a roster of ninety trial examiners, of whom fifty were per diem. The chief trial examiner asked the Board to add ten regular trial examiners and abolish the per diem system. His action became known as the "Pratt Purge." Smith Hearings, Vol. II, No. 5, p. 163.

with the law which the agency is implementing qualifies the trial examiners as experts in that body of law, and this represents a gain for all parties involved in cases. It here meant considerable aid to the Board in handling its burden, since it led to more employer compliance with the recommendations of the trial examiner.

The press of cases brought a fluctuating number of trial examiners. All told, up to May, 1940, some 123 different persons had been used as trial examiners by the Board. Of the 123, 13 were "on call" less than one month; and this number does not include those persons who were hired, for example, December 3 and released January 4, a period of "on call" service of one calendar month. Fifty-eight of the 123 persons were on the roll of the Board less than one year. Probably an approximate number of 43 of the 123 on call were unsatisfactory and could not meet the standards laid down by the Board for the performance of the trial examiner.<sup>47</sup>

Of the trial examiners used, approximately 40 were left by May, 1940. Of the 40, the Board service may be indicated as follows:

<i>Board service</i>	<i>Number</i>	<i>Per cent</i>
Under ten months	5	12.5
10-19 months	1	2.5
20-29 months	18	45.0
30-39 months	15	37.5
40-49 months	0	
50-59 months	1	2.5
	40	100.0

Of the trial examiners, then, in May, 1940, a highly competent group should have been developed, since 85 per cent had then had almost two years' experience as a minimum, and up to five years as a maximum, apart from qualifications that might be offered in the way of native ability, legal training, and courtroom experience prior to Board service. The reduction to 40, after the per diem system was abolished, was made possible by three factors: (1) The case load began to stabilize through 1939 and 1940, following the 1937 bulge; (2) the efficiency of the trial

<sup>47</sup> Information here was through courtesy of Mr. George Pratt, Chief Trial Examiner.

examiners increased after 1938 through the institution of a training program; (3) better attorneys and other changes made by the Board in the regional offices and in the complaints reduced the size of the records and brought better hearings.<sup>48</sup>

The trial examiners used by the Board are meant to be men well qualified in the law, in experience, in labor relations, and in general ability. The Board prefers men with legal training because the employers almost invariably present their cases through legal talent, and the legal profession has a "Mumbo-Jumbo" all its own. It is important that the trial examiner know what is said so as to develop the record properly, for when the Board goes into the courts it places reliance upon a record which must be legally strong. Not only does the Board desire the men to have a legal training, but it has also sought men with four or five years' courtroom and trial experience, or the equivalent. The equivalent of such experience might be a broad category under which could be subsumed anything the chief trial examiner, or Board, desired. Usually the idea of equivalence is satisfied with a clear indication that the applicant has had actual practice before an administrative agency similar to the Board, such as the Federal Trade Commission or the Interstate Commerce Commission, or perhaps experience such as in the arbitration of labor disputes.

It was seldom possible for the Board to obtain men who possessed both the requisite legal experience and a background in labor relations. A letter to the Deans of various law schools in 1938, asking that men with the requisite ability, training, and background be recommended, produced no worthy results. The chief trial examiner does not require the trial examiner to be "labor-minded" in the sense that the examiner is to organize the unorganized. He does require the applicants to know and believe in the expressed public policy, although this could become an extremely difficult question. The chief trial examiner inquires as to why the applicant desires the position when it requires constant traveling over the country. This simple question does not seem important; but the continual travel wears down the examiners, and the result is likely to be a break under the strain

<sup>48</sup> In 1941, the Board had but 26 hearing examiners, due to congressional reductions in 1940. The case intake increase in 1941 meant the division was creating a backlog, and the Board asked Congress for funds with which to increase the number of trial examiners.

with consequences in the hearing and in the courts that militate against the Board.

When seeking a person to hear a trial case, the Board could not very well list a proper "personality" as a qualification. Yet this is probably no unimportant asset to be possessed by a trial examiner. It is useful to the Board to have trial examiners who have the ability to resolve a dispute during a hearing and thereby prevent further litigation; hence if an applicant appears to have the proper qualifications and in addition appears to have ability to soothe employer-employee relations, he would merit consideration. There is no way by which one can measure the importance of personality as against legal ability in the selection of trial examiners, but the Board seldom was able to obtain both for the salaries it could offer.

The probationary period was introduced as a part of the training that all trial examiners receive before they are trusted to hear a case. When they first come with the Board, the trial examiners are given from four to eight weeks to study. Then the examiner is sent into the field with another trial examiner for a period of time. He returns to Washington for further training, and all told typically receives six months' training before he actively hears cases.

The factual picture of the trial examiners includes three persons not trained as lawyers.<sup>49</sup> One of these had been a sociologist in training and work, a research worker, and once supervised a health survey for the United States Public Health Service. Although not trained in the law, he developed the ability to hear cases. Another was a former lecturer at Harvard University, Head of the School of Business Administration at Boston College, a first lieutenant of the United States Army, an expert economist with the Census Bureau, a member of the Labor Advisory Board under the National Industrial Recovery Administration, and a worker with the Bureau of Labor Statistics and the Bituminous Coal Commission. His experience provided capability in background if not in legal training. The third examiner had once been a newspaper editor and publisher and had served as assistant secretary for the Boston Chamber of Commerce for a period. All three had very good records with the Board on the basis of

<sup>49</sup> As of May, 1941.

their ability; and they managed to learn the legal terminology, although legal experience would have probably rendered them still more able.

On the whole, the trial examiners were all experienced persons, with legal experience varying from a maximum of fifteen years to a minimum of five years except in the case of the three not trained as lawyers. Except the three, all were members of the bar, and all had been graduated from law schools. The three not trained as lawyers are regarded as having equivalent experience. Almost all the examiners had engaged in private practice of their own; some had held responsible governmental legal positions; a scattering had served as judges on the bench; a few had held union affiliation before coming with the Board; one had served as the Law Editor for the *Encyclopedia of the Social Sciences*; one was once the Chairman of the Board of Governors of the University of West Virginia and had also served as title examiner for the Public Lands Division of the Department of Justice; several had experience as responsible business executives; several had been in the legal departments of large and important corporations. In 1939 the range in age of the trial examiners was from thirty-two to seventy-one years; the median was forty-one and the arithmetic mean was forty-six years.<sup>50</sup> The division could not be said to be composed of young men, although the age difference between the trial examiners division and the review section is pronounced; and the trial examiner division is the oldest in the Board in terms of average age.

The failure of the per diem system of trial examiners and the change to the system of regular trial examiners, together with proper supervision of the division, training of the men, and development of the system of review within the trial examiners division, all contributed to a clear improvement in the intermediate report. The trial examiners, well-qualified on the basis of background and training, were not accomplishing all their possibilities until the division was more carefully organized. The Board was not unwilling to improve the operations at all points where improvement was feasible, and the Board and the chief trial examiner were for long anxious to improve the trial examiners division through more funds. It was hoped to induce

<sup>50</sup> H. Hearings on N.L.R.A., Vol. II, pp. 391 ff.

more highly qualified individuals and to add to their number so that the burden per examiner would be lightened. This was not possible; but without going to such lengths the Board, following the influence of the chief trial examiner, was able to improve the division perceptibly by making changes in organization that eventually enabled cases to move more rapidly, enabled cases to be tried better, and provided the appearance of a just and judicial hearing moderated by able and experienced men. This last is an important feature from the realistic view of furthering good public relations and respect for the Board.

## Chapter XVIII. THE REGIONAL OFFICES

### A. General

The nature of labor relations, with the Government an active participant, renders a regional type of organization necessary. Well realizing the possibility of employers' descending upon an agency located in Washington without field representation, the Congress contemplated the maintenance of the regional basis for administration of the Wagner Act. This was especially necessary because of the investigatory functions of the Board in complaint and representation cases. The adjustment work carried on by the Board is possible only with local relationships established between the Board, the employers, and employees.

The National Labor Board operated through twenty regional offices, including two subregional offices. This number was inadequate; and when the first National Labor Relations Board was established the number of offices was increased to twenty-five, including seven subregional offices. The experience indicated that the volume of cases, the pressure in industrial areas, the inconvenience and length of travel, all justified the additional offices. Whereas the National Labor Board had no offices in Baltimore, Milwaukee, or Denver, the first National Labor Relations Board established offices in those cities. When the present Board was created, it established twenty-one regional offices. Although reliance was placed upon the experience of the first two Boards, the present Board combined the offices in Newark and New York, in Cincinnati and Toledo, in Portland and Denver. The Denver office was reopened in 1937 after two years' experience and the demands of national labor organizations had indicated the desirability of another region.

The regional offices of the Board were located in the following

cities: Boston, New York City, Buffalo, Philadelphia, Baltimore, Pittsburgh, Detroit, Cleveland, Cincinnati, Atlanta, Indianapolis, Milwaukee, Chicago, St. Louis, New Orleans, Fort Worth, Kansas City, Minneapolis, Seattle, San Francisco, Los Angeles, Denver.<sup>1</sup> The present offices are spaced strategically on the basis of experience, population, industrial and business concentration factors. The Board has given consideration to the possibility of additional offices, and in 1939 proposed to make two additions. One office was proposed for an industrial area covering Oregon and some Idaho counties, which would enable the industrial activity centering in Portland to be handled with more dispatch and at the same time permit a better organization of the Seattle office. The other region was to be established in Nashville, which would permit a better load distribution in the South. Congressional approval, however, was not granted; on the contrary, the Appropriations Committee suggested that eight regional offices be amalgamated, but the Board objected on the grounds that rent economies would be more than offset by transportation expense, salary, communication expense, a decrease in efficiency, and serious inconvenience and expense to the inhabitants of the areas which would lose the offices.<sup>2</sup>

### B. The Regional Directors

The regional directors are in charge of the field offices and officially represent the Board. It is their duty to investigate and adjust cases, and for this work they have the assistance of field examiners. Too, the regional director has a legal staff composed of the regional attorney and assistants. The regional director maintains a working relationship with both the field examiners and the attorneys, assigns cases, and holds conferences with employees, employers, and labor organizations. He makes recommendations to the Board on complaints; if the Board authorizes the issuance of a complaint, it is the regional director who issues the complaint.

<sup>1</sup> Through the Board's first four years, seven offices handled from 49.9 to 57.9 per cent of the complaint cases filed. The seven offices were Boston, New York, Philadelphia, Cincinnati, Atlanta, Chicago, and Los Angeles. Of these, New York was by far the heaviest region, the proportion of all cases which were filed in New York ranging from 13.6 to 18.1 per cent.

<sup>2</sup> H. Hearings on Independent Offices Appropriation Bill for 1940, 76th Congress, 1st Session, pp. 1654-1662; 1665-1666.

in the name of the Board, serves it on the parties, and, in conjunction with the chief trial examiner, sets the case for hearing. When the trial examiner enters an intermediate report, the regional director serves it on the parties and ascertains whether there is employer compliance.

The qualifications the Board would find in the perfect regional director may be indicated. He would have a complete background in labor relations and be conversant with the development of organized labor; he would understand applied psychology; he would be a superconciliator and supermediator; he would have executive capacity to manage subordinates; he would possess tact, patience, diplomacy, and the judicial approach of a competent judge; and naturally, because of the position the official representative of a quasi-judicial agency has in a community, he would be a model citizen. These qualifications can not be found in one person for the annual compensation the Board is able to offer. The Board believes, however, that something less than its ideal is adequate; and the Board concentrates on fairness, impartiality, and executive ability. Overall, the regional directors appear to have been reasonably well suited for their tasks. Indeed, the roster of regional directors has included and does include many of the regional directors appointed under Senator Wagner, Francis Biddle, or Lloyd Garrison, of predecessor Boards—directors who “grew up with” the Board and had years of experience.

No enumerated qualifications are laid down by the Board for its regional directors; the choice has been made upon the general qualifications desirable. A review of the background of the regional directors of 1939, when criticisms of the Board reached a peak, indicated that three held the degree of Doctor of Philosophy, six held law degrees, six apparently were not even college graduates. Thirteen of the directors had had experience in what might be regarded as private business, usually corporations, and often they had done work entailing knowledge and experience in labor relations. Nine had experience with other governmental, public, and semipublic agencies. The over-all list included economists, judges, newspaper publishers, employment managers, former labor mediators under the National Labor Board, personnel managers, a research and industrial engineer, and a former union business agent.

### C. The Regional Attorneys

The regional attorney advises the regional director as to the legality of cases and procedures, prosecutes the cases at the hearing, presents the evidence to the trial examiner, passes upon the legal sufficiency of a complaint before it is issued, and generally acts as the legal adviser for the office. Under the supervision of the regional attorneys are other field attorneys, who not only prepare cases for trial but also conduct representation proceedings where trial examiners are not needed. The heavy burden which regional and field attorneys have always carried was increasing so rapidly in 1941, because of the heavy case intake, that the Board was requesting funds sufficient to add such field attorneys. Hearings on cases were delayed because of an insufficient number of attorneys to do the work associated with complaints and hearings, and the general counsel of the Board has always urged careful preparation of cases.<sup>3</sup>

For trial work in the regional offices, the Board endeavors to obtain attorneys with experience, but here again the Board finds it difficult because of financial considerations to bid for the services of outstanding attorneys. Still, the Board was able to obtain what it regarded as good attorneys who had previous experience in private practice of law, in other governmental agencies, or within the Board. The general level of competency and the qualifications demanded of field attorneys appear to be higher than for the review attorneys, but the regional and field attorneys appear to rank below the trial examiners.

### D. The Field Examiners

The field examiner is perhaps best described as a miniature regional director. He meets both the employers and employees, and very often the adjustment or settlement reached is brought about by the field examiner. If litigation is necessary, the field examiner's investigation is the basis for the issuance of a complaint. In broad terms, the qualifications sought by the Board are

<sup>3</sup> See H. Hearings, F.S.A. Appropriation Bill for 1941, 76th Congress, 3rd Session, Part I, p. 569 ff; H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, p. 553.

similar to those for the regional directors; but much younger persons are used for the positions. In age, the field examiners ranged from as low as twenty-three to as high as sixty; and in 1939 the median age was thirty-three and the arithmetic mean was thirty-six. Some of the field representatives were young in terms of experience, although almost all had had some form of experience in the business world prior to Board association. Many of them were lawyers, and some had experience as investigators and field workers for other governmental agencies. Perhaps too many had specialized in labor relations during their academic careers, and perhaps too few had sufficient experience with employer-employee problems.

The Board again meets the problem of availability of personnel when it attempts to hire as field examiners persons with a broad training in the labor background, perhaps a smattering of law, ample experience in handling situations charged with emotional displays, and the tact and judgment necessary to resolve controversies. Again the financial weakness of the Board places it in a poor position marketwise. It would not be surprising if some of the younger men who joined the Board as field examiners were found to have done so for the reason that they received satisfaction in the belief that they were accomplishing a work that had a "socially creative" value attached. This might be found true of some of the personnel in all divisions of the Board, particularly in the Board's early years.

The Board often places its field examiners on the basis of their knowledge of the region involved, as they often do with the field attorneys. This was especially true in the South, where often there was resentment created by the intrusion of the "damn Yankee," a problem the Board met by sending field examiners who were originally from the South and who better understood local conditions and the manner in which that geographic region approached its problem. In order to avoid future objections, it was not unknown for the Board to send examiners who had been endorsed by southern congressmen.

By early 1941 the Board was requesting funds from Congress for the purpose of adding to the number of field examiners. Such addition was made necessary by the fact that a previous Congress had reduced Board appropriations, so that the Board had an in-

sufficient number of field examiners to do the work even prior to the large increase in case intake in late 1940. On the average, each trial examiner in 1941 had a case load almost double that which would prevail under "ideal" administrative conditions; and this is an important consideration when it is recalled that approximately ninety per cent of all cases require the attention of a field examiner and field attorney and that approximately fifty per cent of the cases never get beyond the field examiner. A shortage of field examiners would mean, of course, either the creation of a backlog, which would bring public criticism of the Board and injure it further; or it would mean less careful handling of cases, which would eventually boomerang in the form of less compliance, more litigation, and more general dissatisfaction with the Act.

## Chapter XIX. PERSONNEL CONSIDERATIONS

### A. General

Under the Act, the Board is relieved of the necessity of hiring, under the Civil Service, its executive secretary, and such attorneys, examiners, and regional directors as it finds necessary.<sup>1</sup> All Washington and field stenographic and clerical help was put under Civil Service, and the Commission furnished such personnel upon request from the Board. In departmental service in Washington, which covered all the positions above the stenographic and clerical help, the personnel was subject to the Classification Act of 1923. Under that Act for those jobs not under Civil Service, the Board draws up and specifies a description of the duties attaching to each position and sends the classifications and descriptions to the Civil Service Commission. The Civil Service Commission then reviews the statement sent by the Board and sends a person to the Board to make a "desk audit" for purposes of comparison with similar positions in other agencies. Upon the basis of the Board's description and the Commission's conclusions, the Civil Service Commission draws up a classification which controls the salaries for each classification, and each position is located within a classification, so that the status of the personnel is similar to that of workers under Civil Service.

In the field, except for the stenographic and clerical help, the personnel was graded comparably by the Board but was not classified under the Classification Act procedure until the Board had a survey made by the Civil Service Commission after November, 1940. The Commission's survey revealed one overclassification of position, many proper classifications, and some underclassifications. The Board then sought additional funds from the Con-

<sup>1</sup> Appendix I, Section 4(a).

gress so that inequities could be corrected and competent persons, either from within or without the organization, could be both retained and obtained through remuneration based on proper classifications of positions. This meant, of course, that for several years the Board had been paying too little for certain positions, which accentuated the Board's problem in recruiting able personnel. By 1941 the Board had adopted a resolution to put all employees, from the general counsel down, under Civil Service, effective January 1, 1942.

The Board also makes use of temporary employees at times. Such service is mostly relied upon where elections are held and the demands for adequate personnel can not be met by the permanent staff. An election, for example, such as the General Motors Corporation election in the spring of 1940, which involved in plants over the entire nation upwards of 250,000 employees, simply could not be handled by a "trained crew" maintained for such purpose unless the election could be held in sections. In such elections, however, the Board has found that there is much campaigning, electioneering, and excitement; and the unions themselves usually desire the elections to be held simultaneously since one election may influence another, and a uniform policy of holding elections at all plants at the same time avoids difficulties that would arise from separate elections. In any event, it is probably a matter of indifference so far as cost to the Board is concerned; and since the Board could not afford to maintain a crew sufficiently large to handle the larger elections, it must rely upon temporary employees. Such employees are drawn from the Civil Service Commission's rolls and largely do clerical work. For elections, the Board has a "team" composed of specialists in election procedure. The specialists are permanent employees of the Board and are conversant with all the practical problems of holding an election.

The Board has not always used the Civil Service rolls for obtaining temporary employees. Sometimes, universities adjacent to the place where employees were needed were a source of supply, but almost always more than seventy-five per cent of the temporary personnel was selected from Civil Service rolls.<sup>2</sup>

<sup>2</sup> H. Hearings on Independent Offices Appropriation Bill for 1940, 76th Congress, 1st Session, p. 1571.

The Board has itself loaned personnel to other agencies for temporary service. The T.V.A. at one time used the services of one man, and from time to time the Civil Liberties Committee used as many as four men. In both instances the men were used as investigators.

In December, 1935, the Board had a total personnel of around 180, most of whom had been transferred to the present Board from the first National Labor Relations Board. The Board members realized that if the Supreme Court were to uphold the Act, there would be a heavy influx of cases that would tax the capacity of the Board. Probably the influx was far greater than the Board ever anticipated; but no matter what the Board anticipated, it could never have induced Congress to appropriate funds in order to train personnel and thereby be prepared for the bulge in cases after April, 1937. After that date the unions brought cases they previously thought not worth while or cases which the Board had been unwilling to receive. In addition, the Board did not always receive the appropriations it requested, although it was given increased funds as a result of the increased work.

The Congressional appropriation to the Board for 1941 reduced considerably the number of personnel with the Board. The attempt by the Appropriations Committee to abolish the economics division has been indicated; but that Committee also desired to reduce the number of field examiners, the clerical staff, the field attorneys, the personnel of the administrative division, the number of trial examiners, and the litigation and review attorneys. It also demanded a reduction in salary for all employees who were given more than a two-step promotion in 1939. This was to be accomplished by the Committee's reducing the requested amount to the extent of \$248,000 in salaries and by specifying where the Board was to make reductions.<sup>3</sup> Congressmen supporting the Board made attempts to prevent the reductions; but the temper of the House, which had meanwhile received the hostile Intermediate Report of the Special Committee to Investigate the Board, permitted no change. Nevertheless, it was thought that the Senate would prevent the reductions, since there had always been stronger Board support in the Senate than in the House. The

<sup>3</sup> Congressional Record, unbound edition, 76th Congress, 3rd Session, pp. 5508-5527.

Senate Committee did prevent the reductions for the most part; but when the bill was returned from Conference Committee, it provided for a considerably smaller appropriation. A major fraction of the reduction affected salaries; therefore the Board in June, 1940, began reducing the personnel in all branches of the service, a step which did injury to the work performed by the Board since there was still the accumulated backlog of cases and the failure of employers to comply with Board decisions was a growing problem. Such administrative changes as no longer using trial examiners for representation cases and the abolition of less necessary work by certain staff attorneys, such as compiling information on cases, alleviated the burden, as did the improvement that came through more experience and better organization of the review section. But the Board has no control over charges and petitions brought to it, and these have increased until the burden is again approaching the level of 1937 and 1938 when were felt the full effects of the *Jones & Laughlin* decision. The following table indicates in terms of cases filed and Board personnel the task confronting the Board. The cases filed following April, 1937, and the changes in personnel between June, 1937, and June, 1938, reflect the reaction of the Board to meet a situation which developed with great speed. The personnel figures for 1939 and 1941 reflect the reaction of the Board to reduced appropriations.

Any perusal of the cited data indicates clearly the source of much of the Board's difficulty with staff and so-called delay. The Act was upheld April 12, 1937, by the Supreme Court. The remainder of that month brought enough cases so that April's addition of cases doubled that of March. In May, 1937, the April load doubled; and the peak was reached in June, 1937, with 1325 new cases filed. The calendar year 1937 saw roughly seven times as many cases filed as were received by the Board in 1936. The Board obtained funds for additional staff only after the passage of several months and then was still confronted with the task of finding and training qualified personnel. Meanwhile the cases continued to create in the regional offices a backlog that moved as a flood crest upon the different functional divisions of the Board. By early 1940 the review division began to keep up with the current load, but the trial section had not yet reached that point.

BOARD PERSONNEL AT INDICATED DATES<sup>4</sup>

Description	Sept. 1, 1935	June 30, 1936	June 30, 1937	June 30, 1938	June 30, 1939	Dec. 31, 1939	April 15, 1941
<i>Departmental</i>							
Administrative	37	60	73	175	239	241	260
Legal	13						
Litigation		10	38	45	51	68	84
Review		17	11	64	98	104	54
Trial Examiners		4	11	24	36	39	36
Economics		4	4	12	13	14	
Information		1	1	2	3	3	4
Total	50	96	138	322	440	469	438
<i>Field</i>							
Regional Directors	20	19	22	20	21	22	22
Attorneys	1	20	24	95	87	79	72
Examiners	16	13	28	97	108	103	102
Clerical	32	34	60	158	183	160	160
Total	69	86	134	370	399	364	356
<i>Grand Total</i>	<i>119</i>	<i>182</i>	<i>272</i>	<i>692</i>	<i>839</i>	<i>833</i>	<i>794</i>

CASES FILED BY MONTHLY TOTALS, 1935-1941<sup>5</sup>

Month	1935	1936	1937	1938	1939	1940	1941
January		110	110	674	480	416	670
February		66	195	629	533	447	848
March		90	239	896	552	526	992
April		142	477	823	601	614	936
May		108	1064	624	588	577	1072
June		86	1283	727	533	529	1024
July		74	1825	605	521	515	
August		112	1119	606	521	630	
September		150	994	594	441	579	
October	203	147	1054	706	510	750	
November	153	88	959	518	575	618	
December	110	128	606	588	517	518	

<sup>4</sup> Smith Hearings, Vol. II, No. 12, p. 354. H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, p. 535. The average salary paid by the Board may be compared with that paid by other agencies:

Agency	Average salary March 1, 1940
N.L.R.B.	\$2568
Federal Trade Comm.	2841
Int. Comm. Comm.	2770
Securities & Exch. Comm.	2794
Board of Tax Appeals	3617
Federal Communications Comm.	2522

H. Hearings, F.S.A. Appropriation Bill for 1941, 76th Congress, 3rd Session, Part I, p. 616.

<sup>5</sup> Smith Hearings, Vol. II, No. 12, p. 354, and courtesy Information Division, N.L.R.B.

The backlog consisted primarily of complaint cases, since the Board arbitrarily endeavored to handle the representation cases. And although the Board had hoped to be on a current basis by the end of the fiscal year June, 1941, there are such considerations as congressional appropriations and the trend of the case load to be considered. The following figures indicate the extent of the backlog.<sup>6</sup>

Year	Number of cases pending on June 30	Number of cases closed during fiscal year ended June 30
1936	330	738
1937	2202	2344
1938	3778	8851
1939	4113	6569
1940	2936	7354
1941	2793 *	8325

\* June 21, 1941. 1941 figures are tentative, supplied through courtesy of the Information Division, N.L.R.B. Relevant here are the cases-filed figures, *supra*.

The personnel of the Board, throughout the various divisions, is young in years. Nevertheless, it handled important cases; and the work accomplished, not the age of those participating, should be the test—at least that is true for those positions requiring a legal training. No Board member or official questioned the importance and advantages of mature judgment among the members of the personnel, and maturity of judgment is perhaps mostly a function of experience. The Board could have chosen, with its limited funds, "political hacks" who would have had much experience of a sort; but the probable results were not appealing. An alternative was to hire young and inexperienced men out of law school who did not yet have maturity of judgment acquired through experience but who were, certainly for a large part of the legal work, competent craftsmen. This seemed desirable for the drudgery that goes with the work of the review division.

A statement by General Counsel Fahy indicates that the Board believed in its choice of young and inexperienced, but able men:

"I believe it [the legal staff] is pretty generally recognized as one of the finest legal staffs ever assembled in the Government. I will defend its competence and trustworthiness anywhere at any time and under any circumstances. I do not mean by this that in the tremendous

<sup>6</sup> Annual Reports, N.L.R.B.:

volume of work of preparing and trying cases under the Act, as expeditiously as possible, often in very hostile surroundings, errors may not have been made, as are made by the bar generally, or that at times inexperience has not been a temporary handicap. I know of no way yet known to mankind how this could have been avoided. But by and large the staff has performed a more herculean task in the last 4 years than any other organization ever had to face in Government service or out of it, and the work has stood up."<sup>7</sup>

The General Counsel indicated that the members of the legal staff engage in specialized work and rapidly become specialists in the field. The young men, although inexperienced in a great many cases, worked out as well as most of the older men. Nevertheless, there was agreement among all that experience was an asset.<sup>8</sup>

While legal craftsmen are clearly needed in, for example, the review work, it is not so clear that elsewhere throughout the Board the legal training has been so necessary; and critics have charged that the personnel had no real knowledge of the labor field. This criticism has some justification. It was probably a simple task for most personnel of the Board to choose as between the opposition in the schism which occurred in the labor movement, and often personnel felt a responsibility to aid the union to organize. Such attitude was not promoted by the Board and did not find favor with employers. So-called "liberals" were not necessarily biased; but the "liberal" outlook plus an earnest desire and effort to enforce the law, together with an absence of tact and judgment ("I represent the United States Government"), meant an approach

<sup>7</sup> H. Hearings on N.L.R.A., Vol. III, p. 1198. To the Smith Committee, Board member Leiserson wrote that the review section and attorneys were, except for the supervisors, inefficient and inefficiently organized. Mr. Leiserson desired to dispense with all but about twenty-five review attorneys, and those retained would be the calibre of supervisors. Mr. Leiserson thought there should be more emphasis on the field work, field attorneys, and trial examiners. Smith Hearings, Vol. IV, No. 1, p. 11. General Counsel Fahy, while with the Board, opposed reductions in the legal staff and disagreed with Mr. Leiserson's views on the efficiency of the review section. See Smith Hearings, Vol. IV, No. 11, p. 328.

<sup>8</sup> As of July 19, 1939, of 234 of the legal staff of the Board, 84.7 per cent had actual legal experience and practice before coming with the Board, although often such experience was not trial work. Thirty-six had no previous actual experience and practice. Of the 36, 18 were in the review section; but 9 of the 18 had held industrial, commercial, or governmental positions. Of 18 in the litigation division, 16 had previous experience in governmental, industrial, and commercial work. H. Hearings on N.L.R.A., Vol. III, pp. 1122 ff.

likely to engender criticism and antagonism to the Board and the Act. The more precocious of the personnel drew, therefore, the appellation "zealots." This was true especially following 1937 when the Board had to expand very rapidly. And since the Board, as a qualification, insisted that the employees be not anti-labor-minded, it sometimes added to the personnel individuals who probably did bludgeon the employer into settlements or compliance.<sup>9</sup> By 1940 the Board had succeeded, apparently, in convincing most employees that the task of the Board was not to aid labor to organize, nor was it to use the force of threat and position to compel compliance; and the "zealot" influence had been considerably reduced. Even when the enthusiasm of the personnel was at its peak, there was no clear-cut bias except a belief in the efficacy of a strong movement by organized labor; but many outside, and some inside, the Board would agree that overzealousness was an unfortunate incident in the history of the Board.

It should be emphasized that the "liberals" and "conservatives" of the personnel could not be relied upon to perform in any predictable manner. The most conservative of the personnel at times got themselves into the most trouble ("I represent the Government"), and "liberals" often were the most conservative persons in the use of their positions. Many of both, deficient in experience and in knowledge of the labor field, simply did not know how to talk with employers or unions and had small comprehension of the employer-employee relations involved. Moreover, the national tradition of individualism and independence made for magnified results when intellectuals, well nurtured in formal education, met the actual problem in the field and found that legislative enactment does not automatically bring complete acceptance. And with a deep-seated anti-union bias among many employers on the one hand, and high-spirited, sincere, and "liberal" young employees intent upon enforcing the Act and instituting collective bargaining on the other, conflict was to be expected.

The Board's administration might have been improved if more

<sup>9</sup> As early as May 19, 1936, the secretary of the Board sent a memorandum to all regional directors to cease bringing pressure against customers of the violators of the Act in order to secure compliance. The memorandum said that such action would bring, and merit, criticism from all parties including the public; hence it must stop. Smith Hearings, Vol. I, No. 5, p. 225.

personnel used in the actual field work and in the purely administrative work had been trained in some field other than the law. Given, for five years, a general counsel, a secretary, and the Chairman of the Board as legal scholars, who realized that the Act would stand or fall by the court record, and given a personnel that contained a large proportion of legal craftsmen, the result was almost necessarily the legalism and legalistic approach that has hovered over most of the Board's history.

It is to be repeated and stressed that a very considerable portion of the responsible personnel, such as division heads, began their career in this field of labor relations back in 1933; and by 1939, when the Board was being so severely castigated, six years' experience could be claimed by most of the major officials of the Board. This fact, however, did not prevent intra-Board differences on procedure, approach, and ideas as to how the issues presented to the Board should be resolved.

### B. Personnel and Politics

In a quasi-judicial agency it is important that the personnel not be selected by the political parties, for the objective is to retain the judicial atmosphere. For that reason, it is often argued that all personnel should be under Civil Service. One normally, then, expects that criticism based on politics concludes that the agency's personnel is composed of political appointees and that therein lies the source of all difficulty; the Board offers a contrast.

The Board has been subjected to much political pressure, and its refusal to yield was the source of much congressional criticism. The Board has never hired personnel on the basis of political recommendation alone but has preferred to hire intellectually capable persons, who were usually without benefit of a record of stump speeches.<sup>10</sup> Rather, the Board independently and broadly

<sup>10</sup> In one instance, a concerted effort was made to have the Board discharge an employee for his allegedly improper professional activities in defense of free speech and free press. After investigation, Chairman Madden wrote Senator McAdoo in part: "We should be very glad to discuss this question with you if you desire to do so. It is only honest, however, for us to advise you in advance that nothing which has been presented to us so far would give us the slightest justification for discharge of the employee. He came to us properly endorsed by competent and reputable people, and his work for the Board . . . has been entirely satisfactory. We have a very definite and difficult task to do here and have the full responsibility of getting it done. We cannot allow our professional

ignored the demands of political potentates and kept the personnel free of "political plum" atmosphere. This action engendered some congressional antagonism, for congressmen often found themselves unable to place constituents among the Board personnel. In part, the result was accusations that the Board had built up a bureaucracy composed of "left-wingers."

It would be naive to believe that political pressure had never obtained any positions; but it is accurate to say that political endorsement has never been a prerequisite for a position with the Board. The Board has been susceptible to congressional recommendations and endorsements, but political appointments have not constituted the keynote for the building of the personnel. As between two equally capable applicants, however, the Board would probably appoint the person who also carried the political endorsement. The Board had some very unfortunate experiences that might be traced to political recommendations; but also some of the best of the personnel could be traced to political recommendations and endorsements. Political appointments are neither good nor bad, but may be either depending upon the selection.

The attitude of the Board and the idea prevailing among many congressmen are well summed up in the following excerpts from a senatorial protest and the reply from the Board's Associate General Counsel. On May 30, 1939, the Senator wrote:

"It has come to my attention from so many different sources that the Legal Division of the National Labor Relations Board *resents* political recommendations. I cannot believe this, particularly from those Members of Congress that have made such a sincere effort to pass legislation improving labor conditions. I have also been told on many occasions that the NLRB did not look with favor upon a graduate of a middle western college and felt that most of their appointments should be given to graduates of Harvard, Yale, and a few select eastern colleges. This also is difficult to believe. The Law School of the University of Oklahoma enjoys one of the best ratings in the Nation, and I should think any well-balanced legal division would want to choose its personnel from various sections of the United States."<sup>11</sup>

help to be selected for us by popular vote." Smith Hearings, Vol. IV, No. 1, pp. 20-21.

<sup>11</sup> H. Hearings on N.L.R.A., Vol. III, p. 1180. Italics supplied. In the same

The reply of the Board's Associate General Counsel read in part:

"Far from resenting suggestions on personnel which are made to us by Members of Congress, we feel very grateful when members who are familiar with our peculiar problems and difficulties are able to suggest to us persons who might assist the Board in carrying out in the most efficient way possible the objectives of the legislation which the Board administers. While we do have a number of lawyers from eastern universities, we also have on our staff men from colleges and universities pretty well scattered throughout the whole country. You may be sure, therefore, that we shall consider [the] application solely from the point of view of trying to judge whether he can do well the work which would be required of a member of our legal staff."<sup>12</sup>

Actually, the Board did at first recruit its legal personnel heavily from the eastern law schools, but this was because those applicants appeared to have a better background in both labor and law than did applicants from schools in other sections. A tabulation of the background of the 234 members of the legal staff on July 19, 1939, showed the following schools with 5 or more members on the legal staff, each of whom held at least the LL.B. degree: Harvard 31; Yale 21; Columbia 21; Georgetown 18; Michigan 10; New York University 8; University of Chicago 8; National University Law 7; George Washington Law 5; California 5; Wisconsin 5; Northwestern 5.<sup>13</sup> While three schools did contribute 31 per cent of the legal staff as of the date indicated, it will be recalled that the Board is interested primarily in competency, not in hiring a proportionate number from each state as Civil Service might do. Despite the Board's independence and aloofness from political pressure, it was cognizant of the weight of the eastern seaboard and moved to reduce the proportion of personnel from that region.

Apparently the Board is the first quasi-judicial agency to call down upon itself, with the same characteristic aloofness and inde-volume, pp. 1155 ff., may be found letters regarding the appointment of various persons recommended by congressmen. Also see various excerpts from the Smith Hearings, e.g., Vol. II, No. 1, p. 8; Vol. II, No. 9, pp. 295-296; Vol. II, No. 10, p. 310.

<sup>12</sup> H. Hearings on N.L.R.A., Vol. III, p. 1180.

<sup>13</sup> Tabulated from a resumé of each lawyer's background in H. Hearings on N.L.R.A., Vol. III, pp. 1122 ff.

pendence with which it faced employers and unions, congressional criticism because there was not too much but too little politics in the agency.<sup>14</sup> Where endorsement was necessary it was a perfunctory and formal rubber-stamping affair without the exercise of caution as to political affiliation. From the viewpoint of the future of the quasi-judicial process, the Board's record here has been commendatory, although this contributed to appropriation reductions and congressional investigation.<sup>15</sup>

### C. The Personnel and Legislative Pressure

In 1937 the House Appropriations Committee reported out a bill which would have cut the Board's appropriation in half. The Board was then, as ever, understaffed and overburdened with cases. A reduction in appropriations would have meant a severe crippling of service. Members of the Board's staff in Washington, together with some of the regional directors, immediately telegraphed, telephoned, and otherwise communicated with various labor organizations in an endeavor to have the unions telegraph protests to their congressmen. The Board knew that it could not do its work if the reduction passed, and it desired the unions to know what was occurring so that blame could be lodged properly when later it would develop that unions' cases could not be handled. There was apparently the small sum of approximately \$100 spent on this Board activity.<sup>16</sup>

In 1939, when the Congress was giving consideration to amendments to the Wagner Act, the Board actively endeavored to obtain the support of local unions, college professors, union officials,

<sup>14</sup> Chairman Madden testified in part:

"Some people say that is part of what the trouble with the Board is—that we haven't political appointments. A great many of our people have been recommended by one Congressman or Senator or another. We are glad to have those recommendations, but nobody makes the selections except ourselves." H. Hearings, F.S.A. Appropriation Bill for 1941, 76th Congress, 3rd Session, Part I, p. 567.

<sup>15</sup> "Inasmuch as good will is essential in order to assure uninterrupted means for the effective pursuit of policies, personal antagonisms arising out of a disregard of patronage problems cannot be ignored. On occasion it may even be necessary to cement alliances by a wise use of the power of appointment. That subject, however, has received so much attention for so many years that no more than passing comment is necessary." James M. Landis, *The Administrative Process*, Yale University Press, p. 62.

<sup>16</sup> H. Hearings, F.S.A. Appropriation Bill for 1941, 76th Congress, 3rd Session, Part I, pp. 597 ff.

attorneys, and other witnesses who might appear before the congressional labor committees. The Board delegated several of the personnel to devote full time to these legislative matters and to draft the Board's opposition to amendments. Further, through the regional directors and other personnel, the Board attempted to persuade witnesses to appear.<sup>17</sup>

These instances of Board "lobbying" brought a suggestion by the Smith Committee that the matter be referred to the Attorney General because the Committee questioned whether the Board had violated United States law:

"No part of the money appropriated by any act shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation . . ."<sup>18</sup>

No action was taken by the Attorney General's office. It was the opinion of the Board's counsel that the statute, never interpreted nor enforced, should be construed to prohibit use of funds for communications sent to congressmen *by the agency*, not to prohibit the use of funds to pay for telegrams sent by the agency to a labor organization which would in turn send telegrams to congressmen.<sup>19</sup>

It may be true that the persons supposedly protected by the Act have insufficient knowledge of congressional activity; it is probably true that an administrative agency feels a trusteeship over persons protected by the laws under which the agency operates; but the propriety of lobbying activity by the Board is at bar.

<sup>17</sup> Smith Hearings, Vol. III, No. 3, pp. 77 ff. Eight to ten attorneys devoted full time to preparation of the Board's defense before the Senate Education and Labor Committee. The Board contended that the Senate Committee gave its permission for the Board to defend itself, which it did, and that activity by its eight or ten lawyers for that purpose and for the purpose of furnishing materials to the Committee did not constitute lobbying. If the Board was correct, there is still the activity relating to witnesses. See Smith Hearings, Vol. IV, No. 11, pp. 326-327.

<sup>18</sup> Title 18, U. S. Code Annotated, Section 201.

<sup>19</sup> H. Hearings, F.S.A. Appropriation Bill for 1941, 76th Congress, 3rd Session, Part I, p. 598.

This is not a question of whether the Board should present its case and its view on amendments when asked to do so by the legislative branch, for it is clear that the Board has a duty to render all possible aid to the Congress in the formulation of policy. Nor is this only a consideration of the threat consciously or unconsciously implied when the Board requests a local union to oppose congressional activity. The important issue is the relationship of the legislative branch and the administrative agency, for as the administrative agency has developed and must continue to develop, there must be the formulation of policy by the legislative branch. If the administrative agency, propelled by its own force, momentum, and funds, is to formulate basic public policy, then the whole administrative process is to be recast. The demand and desire for expertness and flexibility do not constitute license to a small group to determine public policy either before or after legislative enactment. That group should advise the Congress; but it should not use the guise of expertness to formulate in any manner, by legislative pressure, the basic policy. Expertness in legislation is desirable and needed, and here perhaps the Board knew far better than the rank and file of organized labor and employers just what type of legislation would be designed best to accomplish the public will. But a representative government is founded upon participation; and even if legislative errors, inefficiency, and misrepresentation result, there is no choice to be made. The legislature, morally responsible to the electorate, must prescribe the basic policy. Once that policy is made and implementation leads to unsatisfactory results, the agency may and should advise on the appropriateness of changes. But properly constituted representatives, even if not completely informed, must make the changes.

#### D. Centralization of Procedure

Under the National Labor Board and first National Labor Relations Board the administrative organization was extremely loose, and the seat of responsibility was in the regional office rather than in Washington. The outstanding function performed was conciliation and mediation, and it was therefore necessary that the regional office have authority. Washington was only the

policy center, not the seat of operations, although the secretary's office under the old Boards did handle a tremendous quantity of material without adequate supervision and machinery. When the present Board was organized, the secretary's office was retained as the channel through which almost all material had to pass. It was anticipated that the constitutionality issue would be of first importance, and the Board was confronted with all types of charges before policy had been determined. The Board rightly concluded that only the use of extreme caution, the careful scrutiny of the issues and merits of cases, and the inspection of the procedure followed in every stage of a case would enable it to hurdle the legal obstacles. Therefore, the emphasis was shifted from the regional offices to Washington, so that a regional director did not make important decisions of policy. Even after April, 1937, the Board maintained the centralization because many issues were still in doubt, and only by funneling cases through Washington could the Board be sure that the proper procedure and resolution of cases were followed. This would have been true apart from the capability of the regional directors, although the need for centralized control rapidly becomes a personnel problem as Board decisions issue to guide and give precedent to the personnel. This centralization by the Board justified itself in terms of the court record. But as centralized control increases the legal security, it also lengthens the time necessary for case disposition; and the importance of time and speed points to the consideration that those who are meant to benefit under the Act are not well served if delay becomes common and pronounced. This, then, is again the Board's legalistic approach; and it is in contrast with the first National Labor Relations Board, which endeavored to submerge the legalistic approach in favor of promoting collective bargaining through more mutual understanding.

Near the end of 1937 the Board realized, in light of the case load, that some organizing influence among the regional offices was desirable. Therefore, on December 4, two special examiners were appointed by the Board to operate as liaison men between the Washington and regional offices. They were under the general supervision of the secretary's office.<sup>20</sup> Without authority to discipline personnel, to punish for misconduct, or to inquire into

<sup>20</sup> Smith Hearings, Vol. II, No. 18, pp. 509-510.

serious matters, the special examiners were to act as representatives of the Board, work with and advise the regional directors and their personnel, visit and check regional offices, work with the secretary, keep the regional offices posted as to Board policies, carry the benefit of the experiences of the regional offices to others, and in general coordinate the activities of all the regional offices with Washington. It was hoped that such a system would render more uniform and orderly the work of the twenty-two regional offices, promote efficiency, and clear administrative information in order to work toward a sound and administrative method in all the regional offices. The need for such improvement was shown by the fact that the regional director did not even get to hire his own personnel.

The success of the special examiners system, even if the examiners appointed were competent persons, was probably disappointing to the Board in terms of improving administration. Personnel administration was not improved; the contacts between the various regional offices were not improved; there was no correction of incompetent regional directors; the relationship between the Washington and regional office was but little better; the Board had no better coordination among the various regions; the regional directors received no additional discretion which they could use in the operation of their offices; and the regional office got no more of an autonomous standing than it had ever had.

The chief trial examiner and the head of the settlement division, at the request of the Board, investigated the Los Angeles office in July, 1939, where great difficulty had been encountered in administration. Their report embodied within its scope a criticism of the entire administrative organization and was indicative of the general demand, emphasized by regional directors, that administration of the Board be improved. The report as it related to the broad problem of administration may be summarized:

In large part, the secretary's office was not competent to exercise close supervision over the regional office. The reason was that the secretary's office had so much work that proper attention could not be given to progress reports on cases, proper advice could not be given when it was sought, and insufficient help for the regional offices resulted. Even when the secretary's office was able to give help to the

regional office, it usually had insufficient data and a lack of understanding and sympathetic consideration of the situation. This deficiency was not a matter of the individuals administering the positions but a matter of the administrative machinery. The office of the secretary could not handle properly the regional offices and resolve satisfactorily the many problems in each. A paramount need was for more understanding between the regional and Washington office in order that the regional office might know what the Board thought on various problems. The duties of the secretary's office were found to be: (1) The administration of the Washington office, such as dealing with matters relating to formal orders, attending Board meetings, and keeping of the Board's agenda; (2) the supervision of personnel problems, applications, salary schedules, new appointments, training of staff, and complaints; (3) the supervision of regional offices, authorization of complaints, requests for review, direction of field work, decisions on policy matters, reference of matters to the Board, and knowledge of the field staff. The investigators believed this to be an excessive burden and therefore recommended: (1) that the duties of the secretary be confined to those usually conveyed by the title; (2) that a Director of Personnel be set up, charged with the supervision of the Washington and field personnel; (3) that a new division be created to be known as the Regional Office Division, which would have responsibility for handling administrative problems and supervision of work in the regional offices. Such a division would be in charge of a person with a background in labor relations and administrative work, and such a person would be responsible only to the Board. The division would pass upon requests for hearing, advise regional offices on problems, make periodic visits to the offices, keep proper control over staff subject to the Director of Personnel, approve or disapprove settlements of cases, and generally have charge of the regional offices.<sup>21</sup>

The summarized report indicated the impossibility of handling a complex problem in employer-employee relations from a central office through typewritten reports. Full knowledge of all the impinging forces in a problem of labor relations, even though it be designated as a violation of the law, is needed to resolve satisfactorily the dispute. It follows that discretion must be held by local representatives of the Board, representatives who are cognizant of all the ramifications, who have the "feel" of the immediate problem to be solved, and who know that the Washington

<sup>21</sup> Condensed from the full report in Smith Hearings, Vol. I, No. 2, p. 84.

office is inadequate to cope with local situations if the objective is the promotion of collective bargaining. If, however, the primary objective is legal validity of every move taken and if reliance can not be placed upon the regional personnel to make judgments without endangering the legal position of the agency, then there is justification for a centralized administration.

The report made by the special investigators of the Los Angeles office had repercussions. It added to the demand for the appointment of a Director of Personnel and for the creation of a chief administrative examiner to pass upon requests for authorization of complaints. It was also probably in part responsible for a report rendered by four regional directors in October, 1939, in which the four regional directors set forth in detail the administrative weaknesses of the Board. Important summary points, which do not set forth the favorable comments also made by the regional directors, may be indicated:

1. The administrative division was insufficiently organized.
2. By reason of lack of organization, the administrative process suffered in effectiveness.
3. Too many functions were centralized in the secretary's office, and there was too little delegation of responsibility.
4. The secretary's office was overburdened with work.
5. There was too little coordination in the Washington division.
6. There were too much isolation and too little coordination between Washington and the regional offices.
7. A definite personnel policy was lacking.
8. The Board was participating in too many administrative details.
9. The findings constituted some of the major causes of the delays which had provoked criticism.

That the Board itself realized that there were certain shortcomings in its administrative side is well indicated by the testimony of Chairman Madden before the Appropriations Committee. Harried at every turn by unions, employers, professional opposition, congressional investigations, and the press, still the Board was endeavoring to improve its own administration:

" . . . The various committees and other people . . . have kept us so much engaged for the past few months [that they] have delayed

important and necessary appointments to our staff, particularly our administrative staff. They have simply not been made. They are important positions and we are not making them on the fly, and the consequence is that the people who should have been appointed months ago are not appointed yet and are not selected yet.

" . . . We have been greatly criticized and are being criticized for inadequate supervision of our field offices; for the inadequate manning of our secretary's office in Washington and we have had our plans laid for some time to do these things properly. If we do them they will cost money but it will be worth the money it costs. But as I said now we can scarcely get our work done without taking time to interview and select important personnel of this kind. For example, our general counsel has been devoting himself for the last 3 months almost entirely to attending upon the congressional hearing as well as other people on the staff. It has hurt us very much and has overworked some of us very substantially . . ." <sup>22</sup>

It will be recalled that by early 1940 the Board had a personnel division and also had set up a specialist to pass on authorization. The two special examiners were still functioning, however, and no other administrative changes of importance had occurred. After Mr. H. A. Millis became Chairman of the Board, certain administrative changes, which had been developed by the regional directors, officials, and previous members of the Board, were made in early 1941. An administrative division was set up to supervise the regional offices and to oversee the issuance of complaints and authorization of proceedings in representation cases. The new division included several regional coordinators, whose task was to promote the regional coordination as envisaged by the regional directors' subcommittee, and several administrative examiners to promote case development in Washington. One of the chief objectives to be attained by the reorganization was the decentralization of the Board's work and the delegation of far more responsibility to the regional directors, similar to the situation under the first National Labor Relations Board. As has been indicated, the functions of the secretary were changed to that of an office manager.

<sup>22</sup> H. Hearings, F.S.A. Appropriation Bill for 1941, 76th Congress, 3rd Session, Part I, pp. 591-592.

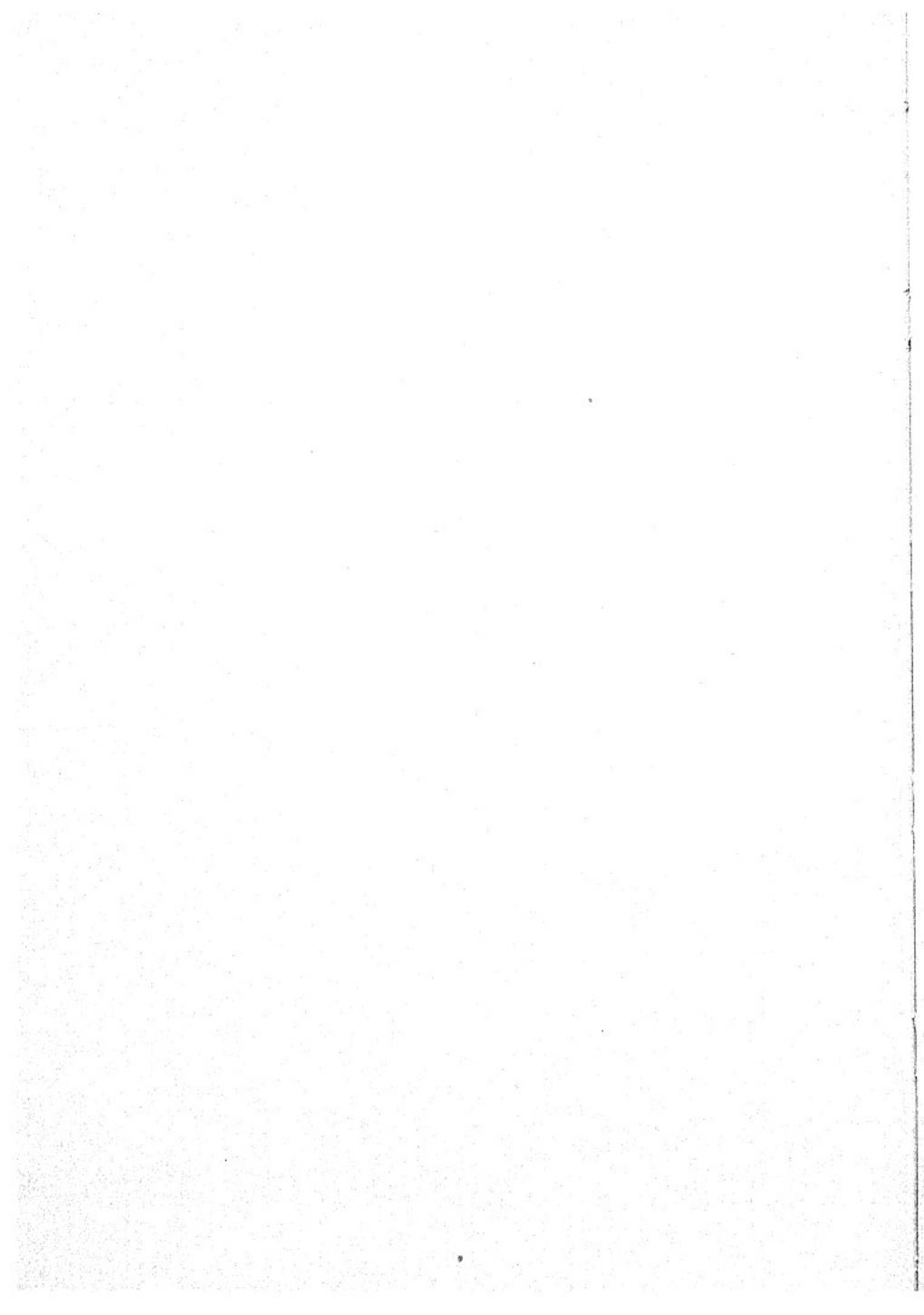
While it is quite apparent that there was a kind of support for the charge that the "Act is sound but the administration must be changed," the lay belief mostly stemmed from biased critics. The greater portion of the criticism that has related to administration is based on inadequate knowledge of the Board and its policies and not on a detailed picture of the administrative workings of the Board.<sup>28</sup> Such criticism, combined with the fact that many cases did require long periods of time under the Board's internal procedure, presented clear evidence to many employees and employers that everything said about the Board was true. But the delay arising out of the unions' abuse of the Act through such tactics as filing a complaint charge to forestall a certification or the legal obstacles raised by employers to forestall compliance with the Act are qualitatively different from the delay to be attributed to deficiencies in administration. Any criticism based on ignorance, on misrepresentation, and on hearsay has no better standing than would a Board decision based upon uncorroborated hearsay testimony.

The importance of administrative deficiencies lies in their contribution to "delay." The Board may have been guilty of inefficient management, but all who have studied the problems agree that many factors were present. The surge of cases in 1937 and 1938, for which the Board may have been partly responsible, was important; and the Board, without congressional appropriations, could not have trained a staff to meet the crest. The expenditure of the Board's energy and resources to satisfy various congressional bodies was important. Union abuse and employer opposition were other factors. Paramount, however, and for which the Board must accept responsibility, was the deliberate centralization of administration which, by sheer weight of created and unrelieved bottle-necks, contributed most to the "delay" problem.

Thus, to insure judicial support and to secure a firm basis for future action, the Board sacrificed speed and flexibility, which are two of the chief advantages of the quasi-judicial process as com-

<sup>28</sup> But even Senator Wagner, while defending the Board from the floor of the Senate in March, 1940, said: "The defects in administration revealed by the Smith investigation should, of course, be corrected. This is almost entirely a matter of personnel administration, and can be accomplished only by close administrative attention and further experience . . ." Congressional Record, unbound edition, 76th Congress, 3rd Session, p. 4314.

pared with a wholly judicial process. The Board's choice of centralization, "delay," and what was regarded as insurance and security of judicial support, as against decentralization, perhaps more speed and flexibility, perhaps divergent regional policies, and the risk of less judicial support, may have been proper. The legalistic approach did contribute to an impressive record in the courts, but the cost of such contribution was the widespread allegation of inefficient administration of the Act. The Board's history presents these alternatives, but there is no way of knowing which alternative would have been better.



*Part Six*

Record and Recapitulation



## Chapter XX. CASE STATISTICS

### A. The Flow of Cases

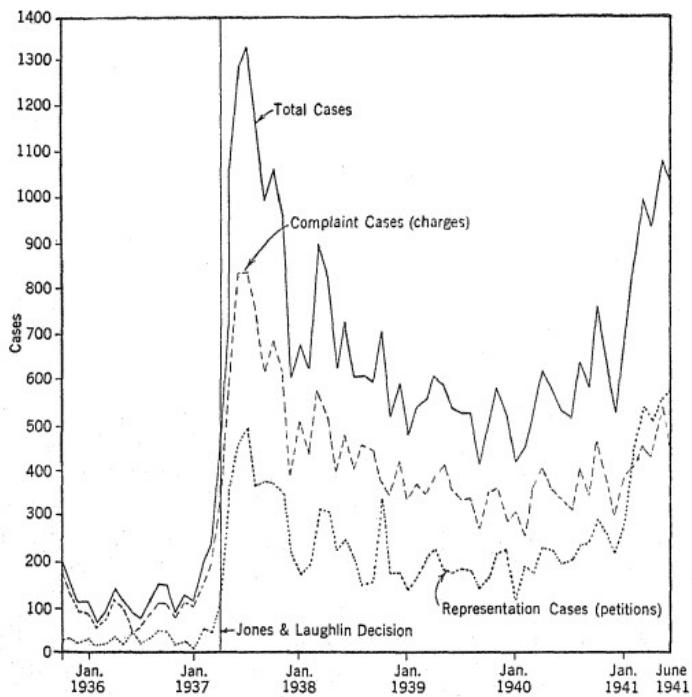
Mention has been made of the intensity with which the burden of cases struck the Board after the constitutionality of the Act was upheld in April, 1937. Chart A (p. 400) clearly shows why any agency would fall seriously behind in the disposition of cases, for even after the rush of 1937 had passed, the flow of cases remained well above what it had been in the early years of the Act. Even after six years the case load was still running regularly over five hundred per month; and although there were reduced and insufficient congressional appropriations, experience and better personnel were on the side of the Board.

Chart A also analyzes total cases by classifying the cases filed as representation cases and complaint cases. While the complaint cases are still important statistically, the representation cases are growing in importance. This is verified by Chart B (p. 401), which shows what proportion of total cases filed since the inception of the Act were representation cases, and this curve appears to be moving upward very gradually. It is probably a favorable sign, for it is likely that such a movement indicates that employers are violating the provisions of the Act less and that employee organizations are replacing charges of violations with petitions for certification of the bargaining agent. On the whole, the proportion of representation cases has been higher since the Act was upheld by the Supreme Court in 1937 than it was prior to that date.

That the Board gradually acquired an ability to render more decisions and orders and thereby reduce "delay" is shown by Chart C (p. 402), which traces the number of decisions and orders issued by the Board from its inception to June, 1941. The figures cover both representation and complaint cases and include stipu-

## RECORD AND RECAPITULATION

CHART A. CASES FILED WITH N.L.R.B.



SOURCE: Fourth Annual Report, N.L.R.B., pp. 189-190, Monthly Press Releases; Courtesy N.L.R.B.

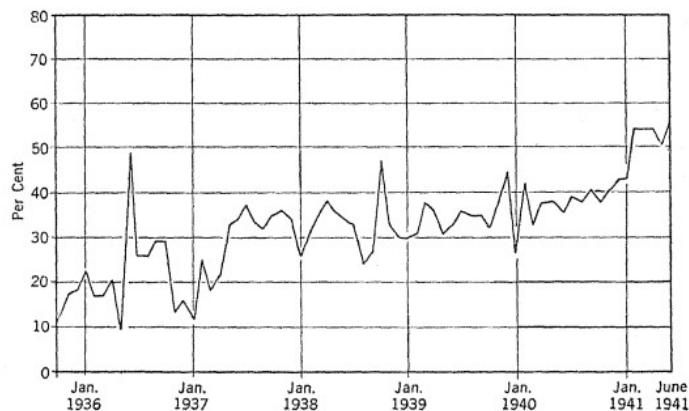
lations, which become more and more important after mid-1937. It was this general improvement which was relied upon to reduce the backlog created by the flood of cases in 1937. This increase was due to an improvement in organization, more experienced personnel, and changes in procedure designed to increase the speed with which cases moved through the Board's machinery; and these factors did in fact operate to begin a reduction of the backlog toward the end of 1938.

The Board's success in expediting representation cases has been shown above.<sup>1</sup> The Board can also point, however, to great strides made in the speed with which complaint cases move. The large number of days in the table below show reason for protest of

<sup>1</sup> *Supra*, Part IV, Chapter XV.

delay brought against the Board by the union organizations. This table, however, should be read with some attention to the charts above, which show the flow of the case load.<sup>2</sup>

CHART B. PER CENT OF TOTAL CASES FILED WHICH WERE REPRESENTATION CASES



SOURCE: Fourth Annual Report, N.L.R.B., pp. 189-190, Monthly Press Releases; Courtesy N.L.R.B.

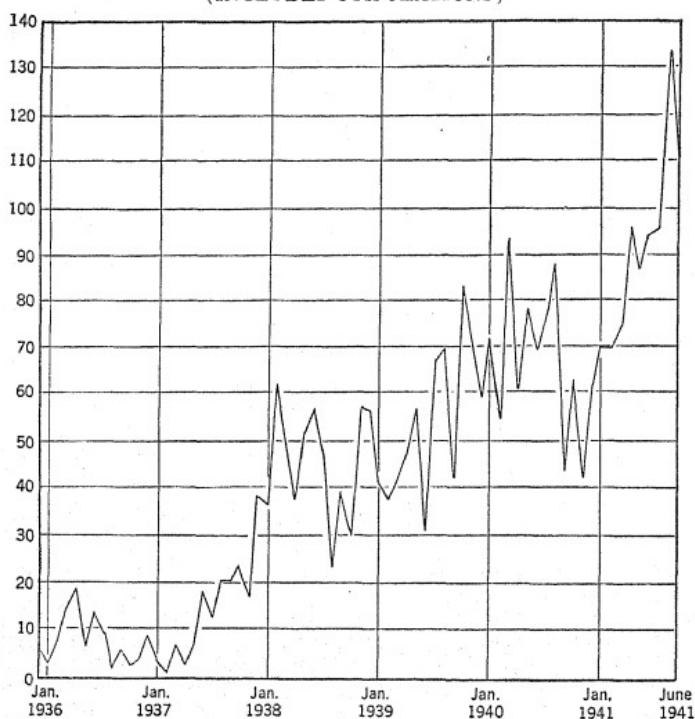
N.L.R.B. CHARGES IN WHICH FORMAL ACTION WAS INSTITUTED,  
AVERAGE TIME ELAPSED IN EACH STAGE OF PROCEEDING,  
OCT. 1, 1935-JUNE 30, 1939.

*Charges filed during year*

Average (median)	1935-	1936-	1937-	1938-	Median
no. of days	36	37	38	39	
Charge to complaint	38	73	94	83	74
Complaint to hearing	18	14	16	15	15
No. days of hearing	6	8	7	7	7
Hearing to int. report	30	58	63	50	57
Int. report to exceptions	14	16	16	30	15
Exceptions to oral argument	25	30	80	20	48
Oral argument to decision	60	130	113	55	96
Total	191	329	389	210	312

<sup>2</sup> Smith Hearings, Vol. II, No. 14, p. 547. The heavy reduction in time necessary from charge to complaint indicates that during 1937-1938 the bottle-neck was probably in the secretary's office, due to the flood of cases. By 1938-1939 improvements had been made to speed the flow of cases through the initial stages, and better cases were coming up for the issuance of a complaint. The great reduction in time from exceptions to oral argument and from oral argument to decision indicates the presence of increased staff and increased competency of the staff in Washington, particularly in the review section.

CHART C. TOTAL DECISIONS AND ORDERS ISSUED BY THE N.L.R.B.  
IN COMPLAINT AND REPRESENTATION CASES  
(INCLUDES STIPULATIONS)



Trade Commission, the Interstate Commerce Commission, and the National Mediation Board.<sup>3</sup>

TIME ELAPSED IN F.T.C. CASES BETWEEN ISSUANCE OF COMPLAINT  
AND FINAL DISPOSITION OF 479 CASES, 1914-1924

	<i>Cases finally disposed of during</i>					<i>Total number cases</i>	<i>Average time</i>
	<i>1st yr.</i>	<i>2nd yr.</i>	<i>3rd yr.</i>	<i>4th yr.</i>	<i>5th yr.</i>		
Orders issued after trial or hearing	42	43	4	..	..	89	13 mos., 1 day
Orders issued by consent or on stipulation							
Dismissed or discontinued after trial or hearing	286	25	10	..	..	271	5 mos., 14 days
Dismissed or discontinued without trial or hearing	9	15	5	1	1	31	17 mos., 18 days
	29	18	17	11	13	88	23 mos., 22 days

The Board's record in cases where decisions and orders are made compares favorably with the experience of the Federal Trade Commission during its first ten years and also with the recent operation of the Federal Trade Commission:

TIME FROM ISSUANCE OF COMPLAINT TO ISSUANCE OF ORDER IN F.T.C. CASES IN WHICH ORDERS WERE ISSUED DURING THE PERIOD JULY 1, 1938-OCT. 24, 1939.

<i>Type of case</i>	<i>Number of cases</i>	<i>Average number of days</i>	<i>Median number of days</i>
Cease and desist orders	374	417	289
Dismissals	13	491	407
Stipulations	7	547	176
Orders closing case	30	1088	555

For a comparison with the Interstate Commerce Commission, the Board relied upon the research of Professor I. L. Sharfman, who wrote as follows regarding the Interstate Commerce Commission's disposition of cases:

"Sample studies made by the Commission concerning the total time elapsed between the filing of complaints and the adoption of reports tend to lend support to the above data of improvement in the condition of the formal docket. For an eleven-month period in 1926, it appeared

<sup>3</sup> Drawn from Smith Hearings, Vol. II, pp. 547-549. The Board presented the material in its own defense.

that a group of 92 cases in charge of commissioners consumed on the average 760 days each, while a group of 12 commissioner's cases for a two-month period in 1931 consumed on the average 621 days each; and that for the same periods a group of 266 so-called board cases, in charge of the chief examiner, consumed on the average 639 days each in 1926, while a like group of 84 cases in 1931 consumed on the average 520 days each. While the data are too meager to justify any precise conclusions, and may not be sufficiently representative even in their restricted scope, they doubtless disclose a general trend toward reducing this time consumed in the disposition of formal proceedings. Substantial savings of time have unquestionably been effected through use of the shortened procedure. . . . The disposition of cases in about a year's time on the average, a goal which has been considerably bettered under the shortened procedure, appears to be not an unreasonable objective."<sup>4</sup>

The Board further pointed out what had been accomplished by the "shortened procedure" of the Interstate Commerce Commission:

"Approximately 35 per cent of the total number of formal complaints are now handled by the shortened procedure method as compared with 30, 32, and 30 per cent during the 3 preceding years. In cases so handled and decided during this year the average elapsed time to reach a decision was 373 days from the receipt of complaint and 231 days from the receipt of the final memorandum. The corresponding periods during the 3 preceding years were 310 and 179 days, 307 and 156 days, and 332 and 194 days, respectively."<sup>5</sup>

The National Mediation Board's Fourth Annual Report was cited by the Board to show that a somewhat comparable agency operating in the field of labor relations was faced with the same problem despite the greater age of the National Mediation Board:

"Broadly speaking, the number of cases now on hand calling for action by the Board will require a year's time to clean up if no new cases are filed with the Board. Delay in the handling of cases has already been subject to formal complaint. The number of delayed cases on hand is altogether too large, and this not only has an adverse

<sup>4</sup> *Ibid.* The material quoted is from I. L. Sharfman, *The Interstate Commerce Commission*, Vol. IV, footnote 10, p. 280.

<sup>5</sup> *Ibid.* Quoted by the Board from the Fifty-third Annual Report of the Interstate Commerce Commission.

effect on the labor relations of rail and airlines, but also makes the ultimate adjustment of these cases much more difficult. Furthermore, delay often is very disadvantageous and unfair to either a carrier or to its employees and many operate under the Railway Labor Act to block changes which should be made in the interest of all concerned.

"The extent to which the Board is able to respond promptly to invocations for its services thus becomes a large factor in realizing the purposes and benefits of the Railway Labor Act. It would be a great help to the rail and air transport industries and their employees if the Board's staff could be sufficiently enlarged to enable it to dispose of the cases referred to it more promptly than is now possible."<sup>6</sup>

With its record over the first four years in rendering decisions in complaint cases, the Board is clearly in a favorable position as compared with older and established agencies; and the Board's 46 per cent reduction in elapsed time between the charge and the decision during 1938-1939 over 1937-1938 speaks well indeed for the Board's overtime effort, which was made despite congressional investigations, insufficient funds, a critical press, and defamation from professional opposition and unions. The long period involved in the disposition of cases is attributable in large part to the case burden which beset the Board and the manner in which that burden came. Particular cases have been cited by union organizations from time to time to "prove" impossible delay by the Board, but such cases were always very complex and involved; and the average figures indicate that not only should the Board not be condemned for delay but it might well be praised for doing as well as it did, all factors considered. While it is said by some that the Board might sooner have corrected deficiencies in procedure and thereby more quickly improved the movement of cases, such statements do an injustice to the conscientious but cautious efforts by the Board. Certainly the major portion of the length of time involved in cases must be assigned to the combination of situations confronting the Board.

### B. The Disposition of Cases

For the four-year period October 1, 1935-June 30, 1939, 22,891 cases were filed with the Board and its various regional offices.

<sup>6</sup> Fourth Annual Report, National Mediation Board, p. 8.

Of this number, 18,788 cases had been disposed of by July 1, 1939, and 4103 cases were pending, including 322 cases where decisions and orders had been issued but compliance had not yet been obtained. The method of disposition may be shown by table.<sup>7</sup>

DISPOSITION OF CASES FILED WITH N.L.R.B.  
OCTOBER 1, 1935—JUNE 30, 1939<sup>8</sup>

<i>Method of disposition</i>	<i>Number of cases</i>	<i>Per cent of total cases closed</i>
Cases closed before formal action		
Settlement	9,005	48.0
Dismissal	2,539	13.5
Withdrawal	4,559	24.3
Otherwise	179	1.0
Cases closed after formal action		
Settlement before hearing	189	1.0
Settlement after hearing	224	1.2
Dismissal before hearing	40	0.2
Dismissal after hearing	88	0.5
Withdrawal before hearing	122	0.6
Withdrawal after hearing	132	0.7
Compliance with intermediate report	41	0.2
Dismissal by intermediate report	19	0.1
Decisions and orders <sup>a</sup>	1,651	8.7
Total cases closed	18,788	100.0

<sup>a</sup> This figure includes decisions and orders in unfair labor practice cases and certifications or refusals to certify in representation cases. It includes 322 decisions and orders with which compliance had not been obtained on June 30, 1939. It also includes decisions and orders based upon stipulations by the parties where Board deliberation would be at a minimum.

The table indicates that 86.8 per cent of the cases were settled, dismissed, withdrawn, or otherwise disposed of, and in only 13.2 per cent of the cases was formal action necessary. It is readily apparent that the Board could not hope to cope with a situation that would mean more cases requiring formal action, and indeed throughout its history the Board has striven for more and more settlements. In defense of the Board, the argument has been made that the dismissals and withdrawals really indicate victories for the employer; and this argument is meant to be an an-

<sup>7</sup> Smith Hearings, Vol. II, No. 12, p. 442.

<sup>8</sup> In fiscal 1940, 6177 cases were received by the Board. Because of the increase in case intake, fiscal 1941, it was anticipated, might see over 10,000 cases filed. Figures vary from year to year, but a high proportion of cases continue to be closed without the necessity of formal action, hence 1939 figures are here used.

swer to the charge that an employer charged with violation of the Act is almost certain to be found guilty by the Board. It may be true that the dismissal of charges by the regional director and the withdrawal of charges by the unions represent in effect a "not guilty" verdict for the employer, but such a conclusion should be qualified. Before it can be concluded that dismissals and withdrawals mean verdicts for the employer, it must be ascertained why the unions withdraw their cases, what cases that are brought are really intrastate cases and therefore should never have come up, what the attitudes of the unions are when they bring charges and petitions, how successful the Board representatives are in persuading the unions to withdraw their cases, and what the policy of the Board is in directing regional directors as to the cases to be prosecuted and those where no complaint is to issue. Court decisions, funds, limited staff, Board policies, all affect the dismissal and withdrawal figures, so that it is hazardous to argue that they represent employer victories.

The normal expectation might well be that the employer would in most cases be found guilty of violating the Act if the case goes through to the decision stage. There is clearly ample opportunity for the employer to endeavor to resolve the conflict prior to the decision stage or even before formal proceedings begin. If no resolution is reached and the case is not withdrawn or dismissed and does enter the formal stage, then it is likely that he will be found guilty. This is verified by the unfair labor practice decisions issued between January 1, 1938, and November 1, 1939.<sup>9</sup> During that period, 418 decisions, not including those issued based upon stipulations, were issued. In forty-five cases the complaint was dismissed in full, which is to say that the employer was completely exonerated. In 237 cases the complaint was dismissed in part, and in 136 decisions the complaints were sustained in full. Thus, in 10.7 per cent of the decisions the employer "won" in the sense that the Board found no violation; in 32.5 per cent of the decisions the complaint was fully sustained; and in 56.7 per cent of the decisions the complaint was partly dismissed. Unless one were to tabulate the dismissals in all decisions where the complaints were partly dismissed, one could draw no valid

<sup>9</sup> The statistics on disposition of cases are from Smith Hearings, Vol. II, No. 12, pp. 442-446.

conclusions as to whether the verdict was really "for" or "against" the employer, although the Board's refusal to dismiss a case completely indicates some violation of the Act. But the partial dismissal of the complaint might range from the Board's dismissing the discrimination complaint for one out of any number who might be named in the complaint to the dismissal of substantially everything of importance in the complaint except the general proscription as the basis for an order commanding the employer to cease and desist from interfering. Whether the dismissal is effectively a ten per cent dismissal or a ninety per cent dismissal does not alter the fact that anything less than a full dismissal must mean that the Board finds a violation, and in 89.3 per cent of the decisions in one period the Board completely or partially sustained the complaint—a high percentage, true, but probably not high enough. One might reasonably expect that the various steps set up to ascertain the facts and to permit the parties to settle their differences would narrow the cases so that the only ones that did get to the decision stage would completely justify progression that far in the sense that the employer would be found guilty of violating the Act. As competency of the staff increases and as the mechanics of handling cases is increased, one might suppose that the number of decisions which would run against the employer would approach 100 per cent, which would tend to reduce the number of useless hearings and the formal procedure and would indicate greater Board efficiency and more acceptance of the spirit of the Act.<sup>10</sup>

Additional data on the 418 cases throw still more light on the inadequacy of investigation by the Board. In those decisions, 12,975 employees were involved in charges of discriminatory discharge. The allegations were upheld by the Board for 10,371 employees and dismissed with respect to 2,604 employees, or 80 per cent and 20 per cent, respectively. But, 4,300 employees where the allegation was upheld by the Board were involved in one decision; and if they are subtracted there is left a percentage

<sup>10</sup> Later data support this argument. Of 276 decisions rendered in complaint cases between July 1, 1940, and April 30, 1941, 12 of the decisions, or 4+ per cent, dismissed the entire complaint; in 40 cases, or about 15 per cent, the decisions partially dismissed the complaint, partially found the complaint sustained by the evidence. In 224 decisions, or 81 per cent, the complaint was sustained by the evidence. H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, p. 532.

of 70 per cent where the allegations with respect to discriminatory discharge were upheld for the employees, 30 per cent where the allegations were dismissed. Further, of 220 decisions of the 418 where the employer was charged with a refusal to bargain, the allegation was upheld in 66.8 per cent of the decisions and dismissed in 33.2 per cent. The discriminatory discharge and refusal-to-bargain proscriptions are heavily used by parties bringing charges and are therefore fair indices of how the Board is performing. It here appears that the Board's staff investigation failed in too high a proportion of cases to investigate sufficiently, so that the Board in effect had to spend too much of its energy correcting errors made in some stage prior to the decision.

The disposition of the 18,466 cases completely closed may be analyzed in terms of complaint cases and representation cases.

Of 12,281 complaint cases, 93.4 per cent were closed before formal action. Of the 6.6 per cent going to some stage of formal action, only 2.7 per cent of the cases went to the last stages of either Board decision dismissing the complaint or compliance with Board decision. For the AF of L, the CIO, and unaffiliated unions, the percentage of cases disposed of before formal action was between 90 and 94 per cent, and the percentage differences between the three groups were negligible. Unaffiliated unions settled a smaller proportion of cases than did the AF of L and CIO, each of which settled 51.5 per cent of their cases. Individuals brought almost 9 per cent of the cases, but 97.9 per cent were disposed of without formal action. The CIO and AF of L brought 87.2 per cent of all complaint cases; and of the total cases brought by the two organizations, the CIO brought 48.6 per cent and the AF of L, 51.4 per cent. Clearly the two national organizations made chief use of the Act.

Of the 6,185 representation cases, only 77.8 per cent were disposed of before formal action. This was chiefly because unions often desired and demanded formal certification; often an election had to be ordered and held because of the employer's refusal to join in a consent election; or the AF of L-CIO conflict would require an election. AF of L unions settled 50.6 per cent of the cases they brought, while the CIO settled 50.2 per cent of their cases. Only 24.7 per cent of the cases brought by unaffiliated unions were disposed of by consent election, recognition, or pay-

roll check. A contributing reason for this low figure would be the Board's caution to insure that unaffiliated unions were not company unions. The AF of L settled more cases by recognition than did the CIO, but the CIO settled more cases by consent elections. As between the CIO and the AF of L, more cases were closed for the CIO by certification after election than for the AF of L, although there were not pronounced differences in the methods of disposition after the Board had instituted formal action. Of the representation cases brought by unaffiliated unions, 50.2 per cent were either dismissed or withdrawn before formal action. Of the 6,185 closed representation cases, 87.2 per cent were brought by the AF of L and the CIO, which again indicates the proportion of the Board energy devoted to the major national organizations.

For all complaint cases disposed of by the Board before formal action, the median number of days from the filing of the charge to the closing of the case was 46 days. The AF of L cases were handled in 43 days, while CIO cases required 50 days. For complaint cases where formal action was necessary, the AF of L cases required 287 days, the CIO cases required 345 days, and the unaffiliated unions required 219 days. The median for all cases was 312 days.

In representation cases disposed of before formal action, the median number of days was 37. AF of L cases required 37 days, CIO cases required 32 days, and unaffiliated unions required 60 days. Unaffiliated unions probably were subjected to a more thorough Board investigation. Where representation cases required formal action and elections, AF of L cases required 147-151 days, CIO unions required 164-170 days, unaffiliated unions required 187-194 days, and the median for all cases was 161-164 days. Where the petition could be disposed of without an election, approximately six weeks less time was required for AF of L and CIO cases, about twelve weeks less time for cases of unaffiliated unions, and about six weeks less time for all cases.

It has already been pointed out that the length of time required for cases is not only a matter of Board machinery and caution but also a matter of what union organizations do to affect the speed with which cases move through the Board's machinery.

The statistical picture indicates the great amount of work per-

formed by the Board since its inception. The great number of cases, involving a tremendous volume of testimony, give evidence of the burden the Board has carried. In 1936 there were 175 hearings with 87,892 pages of transcript; 136 hearings were held in 1937, with 99,498 pages of transcript; in 1938 the hearings rose to 1,019 and the pages of transcript to 913,845; in 1939 there were 654 hearings with 624,351 pages of transcript. Nineteen forty saw 934 hearings and 351,404 pages of transcript; and through August, 1941, there were 731 hearings with 214,183 pages of transcript.<sup>11</sup> The large number of hearings and the reduced number of transcript pages are clear evidence of better records because of experience, and better preparation of cases. This impressive volume of work stamped the Board as one of the busiest of the administrative agencies: For example, in 1936 and 1937 the I.C.C. held more hearings and had more pages of transcript; but in 1938 and 1939 the Board's pages of transcript exceeded considerably those of the I.C.C., although the number of hearings held by the Board remained below the number held by the I.C.C.<sup>12</sup> Compared with most other agencies, the Board, although in some instances holding fewer hearings, was apparently confronted by longer cases as indicated by the pages of transcript.

Despite all the statistical evidence which might be presented to show the burden of work, there are no statistics which include services performed where no "case" actually exists, such as a regional director conferring with an employer or a union representative. Proper public relations make demands upon various Board officials, including the Board members themselves; and such service as is rendered in an attempt to educate employers, employees, and the public in the Board's work shows nowhere in statistical form. When one considers the mediatory situation in which various representatives of the Board from time to time find themselves, and other services rendered by the Board, such as educational, then this is not an unimportant part of the burden the Board has carried.

<sup>11</sup> N.L.R.B. Press Release Z-721u; and Information Division, N.L.R.B.

<sup>12</sup> *Ibid.*

## Chapter XXI. EFFECTS OF THE ACT AND THE BOARD

### A. The Stages of Opposition

By 1940, the Act and the Board had gone through three distinct and separate stages of opposition. Each stage emerged from but differed from its predecessor, and each stage reflected similar objectives: Either to abolish the Act, to "equalize" the Act, to change the procedure and limit the operations of the Act, or to change the Board and thereby change the implementation of the Act. Three stages of opposition stand in relief.

"*The Act is unconstitutional.*" The first stage of opposition took the form of a campaign to convince the public that the Act was unconstitutional. Although the Act had passed with impressive majorities in both the House and Senate, various groups were opposed. Organized labor was not here included; on the contrary, labor praised the Act and those who had supported it. Various business groups, however, opposed the Act and continued to attack it. On September 5, 1935, before the Board was organized or had drawn its rules and regulations, one very effective opposition move occurred. The National Lawyers Committee of the American Liberty League, comprised of fifty-eight eminent attorneys, issued a report on the constitutionality of the Act. The committee held that the important provisions of the Act were invalid on the grounds of due process and congressional power of enactment, *i.e.*, that the Congress had exceeded its commerce power, and probably also on administrative grounds.<sup>1</sup>

<sup>1</sup> "The perennial struggle of American administrative law with nineteenth-century constitutional formulations of Aristotle's three-fold classification of governmental power, the stone wall of natural rights against which attempts to put an end to private war in industrial disputes thus far have dashed in vain, and the notion of a logically derivable super-constitution, of which actual written constitutions are faint and imperfect reflections, which has been a clog upon social legis-

The report concluded that the provisions which were invalid and objectionable would render the Act ineffective. Included in this report was a long and thorough brief which may have been relied upon extensively by the legal profession throughout the nation when it later came before the courts.<sup>2</sup> The Board was soon engaged in a mass of injunction suits.<sup>3</sup> The Act carefully set forth the procedure for complaint, hearing, Board decision, and judicial review for the aggrieved person in the circuit courts of appeals, and there was no anticipation that the district courts would enter the procedural process. But the ample protection provided in the Act did not deter the legal profession, the members of which refused to believe that the Act would stand; and opponents went into the district courts and prayed for temporary restraining orders and the later temporary and permanent injunctions. The bill of complaint would allege the Act to be unconstitutional, that only intrastate commerce was involved, that Board hearings would bring irreparable damage by disturbing employer-employee relationships, that it would subject the company to the production of records, etc. This type of Board opposition spread rapidly; and as it spread, the list of possible damages in the bills of complaint increased. Such legal tactics absorbed the Board's energies for the most part during the first year. If the Board could not hold hearings in accordance with the statutorily prescribed procedure, then it could not apply the Act. It was plainly necessary, therefore, that the Board resist this legal coup, and resistance meant an additional burden for an already understaffed agency.

In the district court the Board's legal position was that a court of equity had no jurisdiction over a question of statutory pro-

lation for a generation, bear daily witness how thoroughly the philosophical legal thinking of the past is a force in the administration of justice of the present." Roscoe Pound, *An Introduction to the Philosophy of Law*, Yale University Press, p. 15.

<sup>2</sup> H. Hearings on N.L.R.A., Vol. VIII, pp. 2241-2287. The committee was of course within its bounds in expressing opinions on the constitutionality of the Act. In view of the Supreme Court's past record in the fields of due process and interstate commerce the committee reached a reasonable conclusion. Apparently, however, some members of the committee went so far as to advise their clients to ignore the law because it would be declared unconstitutional. Even if such advice be regarded as ethical, it is arguable that such advice when given by a concerted group would have a different aspect.

<sup>3</sup> See First Annual Report, N.L.R.B., pp. 46-50.

cedure and that if damage resulted from the Board's process prior to judicial review it would be slight and incidental and not such as to justify a district court injunction; therefore, no injunction should issue, and certainly the district court should not undertake to pass upon the constitutionality of the Act. The Board's argument prevailed for the most part and eventually was completely sustained by the higher courts of the land. The injunction stage of opposition was ended for the most part in April, 1937, when the Supreme Court passed upon the five Labor Board cases. While on the one hand this stage of opposition did damage to the Board in terms of public prestige, employer opposition, additional legal burden, and public questioning as to the validity of purpose, on the other hand it demonstrated to the Board that it best gird itself for stiff legal battles. Even so, the Board probably always underestimated the strength of the opposition during the early years.

*"The principle is right but the law should be equalized."* Beginning with the Supreme Court decisions of April, 1937, a new attack was launched against the Act and the Board. This took the form of glorifying the right of every man to join a labor union and to be protected in that right. At the same time it was insisted that the law, after being in existence since 1935 although not effective throughout that period, obviously needed improvement and equalization, not only substantively but procedurally. This was said to be necessary to protect employers and employees, not only from each other but also against indiscretion by any Board or Board members which might be appointed. Congress was therefore flooded with amendments to the Act, and the House and Senate labor committees began holding hearings and receiving evidence from unions, employers, employer associations, employees, college professors, representatives of miscellaneous groups, and the Board. There was some attempt during the hearings, which continued into early 1940, to urge a new Board. There were charges that the Board had misconceived the Act, had misinterpreted it, had been unfair, and had usurped power never granted. The AF of L and employers' associations joined in the attempts to amend the Act, and the press editorials widely and strongly urged amendment. The House Labor Committee's hearings reached nine volumes, the Senate Labor Committee's volumes reached twenty-four in number, and both com-

mittees thoroughly explored the need for amendments. When it appeared that the labor committees in the Congress were veering toward the maintenance of the Act as it was originally written, another cacophony began its crescendo so that the urge for amendment in part coincided with the third stage of opposition.

*"The principle is right but the Board must be changed."* The attack on the Board and its personnel, and on the Board's regulations, rules, and policies, came first in 1938 in the form of an investigation of the Board and its activities by the Senate Judiciary Committee. This, however, was of short duration and not impressive. Representative Howard Smith of Virginia who, when the Act was up for passage, had spoken and voted against the legislation,<sup>4</sup> with the support of other congressmen from the southern tier of states, introduced a resolution calling for an investigation of the Board. This resolution was passed by the House on July 18, 1939, by a vote of 254 to 134.<sup>5</sup>

The resolution was not passed without considerable dissension in the House. At that time the House Labor Committee was holding hearings on amendments to the Wagner Act; and the introduction of the Smith resolution, propelled by the Rules Committee of the House, brought the charge that the House Rules Committee was sponsoring the resolution. If true, the action of the Rules Committee not only flouted the House Labor Committee but also departed from the traditional function of the Rules Committee, which is to steer legislation and not originate it. Representative Healey charged that the Rules Committee was composed of a "reactionary" majority which was determined to abolish the Wagner Act as it applied to interstate commerce and that what was really involved was a reactionary coalition between the northern Republicans and southern and reactionary Democrats in order to abolish the Fair Labor Standards Act and the Wagner

<sup>4</sup> "Mr. Chairman, I am opposed to this bill because it is obviously unconstitutional; because it forbids the courts of the land to consider the controversies arising under it under the usual rules of evidence and procedure pertaining to other litigations; because it abrogates the right to contract; and because I believe it holds out false hopes that cannot be realized under the present constitution and which will lead to strife rather than peace." Congressional Record, 74th Congress, 1st Session, p. 9692. Mr. Smith was apparently a "purgee" in the 1938 elections. See Congressional Digest, Vol. XIX, No. 3, March, 1940, p. 67.

<sup>5</sup> House Resolution No. 258, Congressional Record, 76th Congress, 1st Session, pp. 9592-9593.

Act: The North was to have the Wagner Act abolished, the South was to have the Wage and Hour law destroyed.<sup>6</sup>

As a matter of fact, the earliest resolution for the investigation of the Board was introduced June 22, 1939, and an accompanying resolution would have created a committee to investigate the Wage and Hour Division of the Department of Labor.<sup>7</sup> The resolutions went to the Committee on Rules; No. 229, which would investigate the Labor Board, eventually reappeared as No. 258 and was put through, but the resolution calling for an investigation of the Wage and Hour Division never reappeared. It is interesting in this connection to check the actual voting on the resolution and find that some 82 of the votes for the resolution to investigate the Labor Board were cast by Democrats representing states south of the Mason and Dixon line, where organized labor was endeavoring to organize; some 34 Democrats from north of the Mason and Dixon line favored the resolution. While the charges by Representative Healey may have been leading reasons behind the investigation, it may also be that there were such reasons as a desire to limit the concept of interstate commerce as it applied to labor legislation, to "smear" the Board, to retaliate against the President's "purge" of 1938, to force a change in administration of the Act, or to retaliate against the Board because it refused to hire congressionally recommended persons.

Whatever the reason or combination of possible reasons for the investigation, Congress provided ample funds and a five-member investigation committee with Representative Smith designated as chairman. That Representative Smith may not have been fully conversant with the labor legislation and the labor problems of the nation is indicated by one colloquy which occurred between Chairman Smith and his Committee's counsel during one session of the hearings:

"MR. TOLAND: Mr. Chairman, in that connection [relative to per diem trial examiners] I communicated with . . . the National Mediation Board.

THE CHAIRMAN: The National Mediation Board?

MR. TOLAND: Yes, sir.

<sup>6</sup> Congressional Record, 76th Congress, 1st Session, p. 3375.

<sup>7</sup> House Resolutions Nos. 229 and 230. *Ibid.*, p. 7759.

THE CHAIRMAN: What Board is that?

MR. TOLAND: It administers the Railway Labor Act.<sup>8</sup>

The Committee's task was set forth in five provisions in the resolution: (1) It was to ascertain whether the Board had been "fair and impartial" in its conduct, decisions, and interpretations as between different labor organizations, and as between employers and employees, with special emphasis to be given to the interpretation of interstate commerce. (2) It was to ascertain the effect of the Act on disputes, employment, and general economic conditions of the country; (3) It was to determine what changes in the law and personnel would be desirable in order to carry out better the intent of Congress and improve employer-employee relations; (4) It was to investigate whether the Board had attempted to write into the Act intents and purposes not justified by its language; (5) It was to investigate whether Congress should further define "interstate commerce" and whether further legislation on employer-employee relationships was desirable. Apparently in passing such a sweeping resolution, the Congress felt that the courts did not represent sufficient check against Board activities. The court record alone would lead to the belief that the Board had been a model agency.

The Committee's plan of operation included: (1) an investigation of the files to ascertain the spirit of administration; (2) an investigation of the docket to ascertain how cases were handled; (3) the mailing of some 60,000 questionnaires to employers, employees, unions, interveners in cases, police chiefs, and professors of administrative and labor law; (4) an analysis of Board decisions by the Committee's legal staff. The Committee began calling witnesses on December 11, 1939, and rendered an intermediate report March 30, 1940, in which it recommended legislation which would have changed considerably the functioning of the Board.<sup>9</sup> The Committee did not cease activities at that time, however, but met occasionally thereafter to hold hearings and thereby raised the question whether the Committee was attempt-

<sup>8</sup> Smith Hearings, Vol. II, No. 5, p. 141.

<sup>9</sup> H. Report No. 1902, 76th Congress, 3rd Session. The bill introduced by Mr. Smith to effectuate the recommendations was passed by the House, but the Senate did not act.

ing to force changes in the Board by attrition. The Committee's final report was at last rendered on December 28, 1940.<sup>10</sup>

The three majority members' final report held that the investigation established:<sup>11</sup>

(1) That the Board had been unfair and biased in its conduct, its decisions, its legal interpretations, its attitude toward certain unions, and as between employers and employees. The Board and personnel were charged with partisanship for the CIO, with radical tendencies, and with an entire absence of judicial temperament.

(2) That Board favoritism, solicitation of litigation, and the deliberate use of dilatory method induced and protracted a large number of industrial disputes and that the Board was remiss in its duty to promote equitable employer-employee relations.

(3) That procedural changes were necessary in order more effectively to carry out the intent of Congress and that the personnel of the Board should be completely reorganized.

(4) That the Board exceeded its statutory authority; for example, in "blacklisting," promoting boycotts against litigants, denying to organizations the right to appear and defend, refusing employees the privilege of being heard in their own cases, requiring employers to reinstate with back pay men who had never been hired, promulgating interpretations of the appropriate bargaining unit, and making use of the "run-off election."

(5) That the Board erroneously endeavored to find every conceivable enterprise subject to its regulation under the interstate commerce clause of the Act; that through the "Commerce clause" of the constitution there had been given a tremendous expansion to what was formerly a fairly limited domain of Federal intervention; that States' rights had been virtually nullified by the Board's interpretation of the "Commerce clause"; and since "this problem is not limited to matters covered by the activities of this Board . . . Congress itself must give its attention to the formulation of legislation that may be considered desirable to restore the necessary balance of the Federal system."

The real importance that attaches to the Smith Committee's investigation and the third stage of opposition seems to have been

<sup>10</sup> Smith Hearings, Vol. IV, No. 14.

<sup>11</sup> *Ibid.*, pp. 496-497.

broader in scope than the Wagner Act and the Labor Board alone. What apparently occurred, and it was perhaps no mere coincidence, was that the Board was but the congressional spring-board for an attack against the development of the whole administrative process. This attack was crystallized and given form in the so-called Walter-Logan bill, which finally passed both Houses of Congress and was vetoed by the President.<sup>12</sup> This bill would have divorced the "prosecution" and "administrative" functions of administrative agencies, would have required public hearings prior to the adoption of rules of procedure, would have provided appeal boards within the agencies themselves, would have greatly broadened the power of the courts to review rules of procedure and decisions of agencies, and would have presumably introduced standardized procedure for the various administrative agencies.

The Walter-Logan bill, at least in the minds of many, was also to accomplish what legislators had been unable to do directly with regard to the Wagner Act. On the floor of the House, while debate was being held on the bill, Representative Ford of California introduced an amendment which would exempt the Labor Board and the Wages and Hours Division of the Department of Labor from the bill's provisions. Mr. Cox of Georgia, one of the chief supporters of the bill, engaged in a discussion with Mr. Ford:<sup>13</sup>

MR. COX: Mr. Chairman, I rise to say . . . that these are the two agencies which are most responsible for the pending bill.

MR. T. F. FORD: And for which this bill was framed to cripple.

MR. COX: And ought to get.

A consideration of the Walter-Logan bill and a close study of the administrative process leave the impression that the Walter-Logan bill, which would have hampered the Labor Board, was primarily the fountainhead of a general attack against the admin-

<sup>12</sup> H. R. 6324. The House passed the bill on April 18, 1940, 282-96. It was finally passed in the Senate on November 26 by 27-25. The President vetoed the bill, and on December 18 the House voted against passage over the veto, 153-127. Congressional Record, 76th Congress, 3rd Session, p. 4743; Congressional Record, unbound edition, 76th Congress, 3rd Session, pp. 21117, 21501-21512.

<sup>13</sup> Congressional Record, unbound edition, 76th Congress, 3rd Session, p. 7164.

istrative process and administrative agencies. Although the administrative process is presumably an established part of our governmental machinery and has been for decades, the Walter-Logan bill brought the whole series of issues as to the "fourth branch of government," "usurpation of power," "administrative absolutism," etc. Scholars generally regarded the bill as a step backward, not forward, in the development of the administrative method of public control. In a narrow sense, the Smith Committee desired to curb the Board and restrict organized labor. In a broader and more far-reaching sense, the Committee seems to have used the Board as an example par excellence of the need for Congress to modify the administrative process through the Walter-Logan bill, or the Walter-Logan bill was a method to restrict organized labor and the Board even if such method included the destruction of the whole administrative method, or both objectives may have been, and probably were, joined. And, insofar as changes in the public policy of labor and labor relations would have carried unmerited and undesirable modifications of the administrative method, such changes would have been reprehensible in that the proper forward development of the administrative method far transcends in importance the area of public control designated as the field of labor.

### B. The Strikes Record

The preamble of the National Labor Relations Act emphasizes the belief that the protection of the right to organize and the promotion of collective bargaining will lead to fewer strikes and, concomitantly, more industrial peace and less industrial unrest.<sup>14</sup> Throughout the various attempts made by opponents of the Act to repeal or amend it, there has been the citation of strike statistics to "prove" that the Act has made for more unrest, while those supporting the Act have cited figures to "prove" the beneficial effects of the Act in terms of strikes.

Statistics may be inadequate for the purpose of demonstrating the presence or absence of industrial peace. Such strike statistics

<sup>14</sup> As here used, the term "strike" refers to stoppage of work because of either a strike or lockout. It is often difficult to know whether the stoppage is, technically, a strike by the men, a lockout by the employer, or both. In any event, the only reason for differentiation is to assess blame.

as might be offered as quantitative proof can not take account of the qualitative aspects involved in labor-management strife. For example, feudalistic or completely paternalistic industrial organization, with no individual freedom or rights, would illustrate the inadequacy of strike statistics as a barometer of industrial unrest. As congressmen, labor economists, and labor leaders have pointed out, the Act, no matter what the strike statistics "prove," has brought into many communities a kind of industrial democracy that never before existed. The freedom of expression and participation in industrial government on the part of employees are regarded by many as a worthwhile result; hence strike statistics might be regarded as but one index of the prevalence of industrial unrest. Labor turnover might be useful as an index of industrial unrest, but the business cycle as well as qualitative factors modify the importance of labor turnover statistics to show unrest. Strikes may tend to follow long swings of the business cycle; but another factor which seems to be operating quite as much as the business cycle is the opposition to, or encouragement of, trade unionism. Thus, the frequency and intensity of strikes during the latter part of the nineteenth century and early part of the twentieth, during the years 1915-1920, and since the advent of the "New Deal" in 1933, were paralleled by great union activity; and during the war years and the "New Deal" there was a cessation of governmental pressure against unionism. What can be said with some validity is that the strike statistics indicate how often the workers are likely to turn to the strike as a means of bettering their condition or of preventing a worsening of conditions;<sup>15</sup> but the statistics do not indicate the intensity of feeling by employers and employees, nor do they alone measure industrial unrest.

There seem to be not only the belief that strike figures show adequately the extent of industrial unrest but also the belief that all strikes are very costly and are to be prevented as a matter of economic rationality. The characteristics of any militant strike probably play a large part in accounting for this belief: Mass action, picketing, flare-ups of violence—all give the onlooker the idea that such a performance must be economically wasteful.

<sup>15</sup> See U. S. Bureau of Labor Statistics, *Strikes in the United States, 1880-1936*, Bulletin No. 651, Preface by Isador Lubin. This discussion is drawn largely from the Bulletin cited.

But before passing judgment on the economic loss to society because of a strike, other factors must be taken into account. Since the economic intensity of a strike would be measured in "man-days idle," that term must not be regarded as synonymous with "man-days lost." While "man-days idle" and "man-days lost" may measure intensity and loss, they are not synonymous terms because:<sup>16</sup> (1) There may have been overtime prior to the strike in order to build up a stock in anticipation of the strike; (2) there may be overtime after the strike; (3) there may be a chronic over-supply so that the annual output is not affected; (4) while certain employers and employees may lose wages and sales because of the strike, other employers and employees may gain the sales and output so that there is no net loss to the economy.<sup>17</sup>

As an example of the caution that must be exercised in drawing conclusions on strike losses, the case of bituminous coal may be cited. The strike statistics in the United States are well weighted with strikes in the bituminous-coal industry; yet it is questionable if the number of "man-days idle," which might be expected to indicate strike intensity, have any clear meaning in an industry where usually there is a problem of underuse of the labor resource. If they do have meaning, it would become clear only after an analysis of some magnitude.

There are other difficulties in dealing with strike data. Most students of labor point out the impossibility of knowing the real causes of a strike. The advertised causes are often not the real issues at all, and the causes sometimes change while the strike is in progress. When a strike begins and ends is often a matter of arbitrary determination, as may be the number of workers involved. The interdependency of the firms resulting from specialization quite often means that a seemingly remote strike by tens of workers producing key products such as machine tools will have repercussions extending to another firm or firms where hundreds may be made involuntarily idle.

The number of strikes alone is an index of the number of times the strike is used as a weapon to force a demand; the number of

<sup>16</sup> See Bulletin 651, *op. cit.*, pp. 10-11, and the testimony of Isador Lubin before the Smith Committee in Smith Hearings, Vol. III, No. 6, p. 215.

<sup>17</sup> Mr. Lubin claimed that, though the automobile industry was plagued by strikes early in 1937, there was no net loss as evidenced by the fact that producers filled all their orders and were laying off men by October. *Ibid.*

workers involved is an index of the status of the industrial relations and how the strike impinges on the working population; the number of man-days idle is an index of the intensity of the strike, and it includes the number of strikes and the number of workers involved.

In order to picture here the strike situation since the passage of the National Labor Relations Act, certain series have been used which do not reduce the danger of endeavoring to show cause and effect but do indicate strike experience. The series usually go back to 1927 and are brought up through 1939, when the war program was getting under way. Nineteen twenty-seven was selected because from that date the strike statistics compiled by the United States Bureau of Labor Statistics are comparable; too, such series show the strike experience for several years prior to the passage of the Act. By going back to 1927, a period is covered during which organized labor was opposed and company unionism was encouraged, and there was comparative prosperity during some of the years and depression in others. The series also cover the years during which organized labor was definitely encouraged as a matter of governmental policy. For obvious reasons some of the series date from the passage of the Act.

There is no attempt made to minimize the difficulty of dealing with strike data—when a strike starts, when it ends, how many are actually engaged, how long it lasts, in what industry it occurs, all are difficult questions. For purposes here, the determinations of the United States Department of Labor are accepted. Important in the series are the issues involved, the number of workers involved, and the man-days idle. The Department of Labor classifies the issues as follows:<sup>18</sup>

- I. Wages and hours
  - a. Wage increase
  - b. Wage decrease
  - c. Wage increase, hour decrease
  - d. Wage decrease, hour increase
  - e. Hour increase
  - f. Hour decrease

<sup>18</sup> Bulletin No. 651, *op. cit.*, pp. 58 ff., and Appendix II.

**II. Union organization**

- a. Recognition
- b. Recognition and wages
- c. Recognition and hours
- d. Recognition, wages, and hours
- e. Closed-shop
- f. Discrimination
- g. Other

**III. Miscellaneous**

- a. Sympathy
- b. Rival unions or factions
- c. Jurisdiction
- d. Other (delayed pay, disciplinary methods, speed-up, vacations, etc.)
- e. Not reported

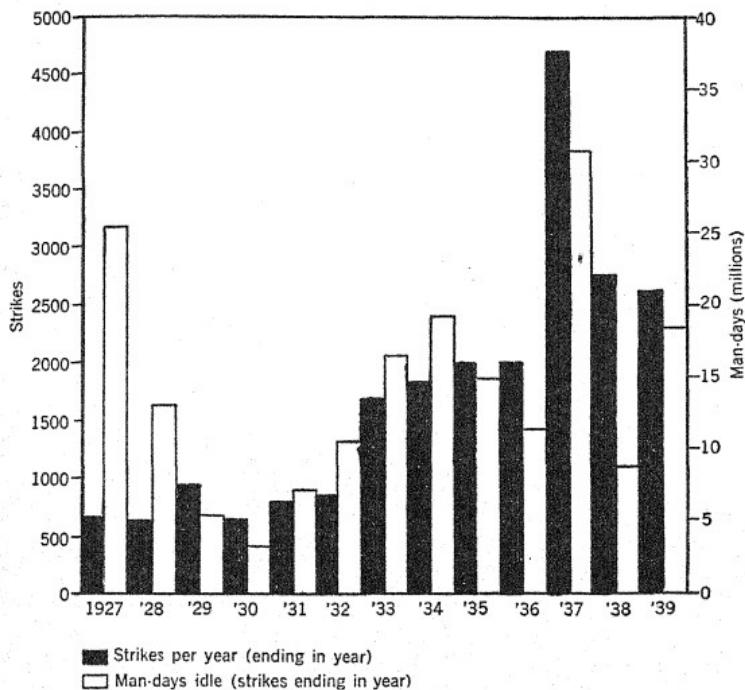
If it is assumed that the strike record is indicative of the presence or absence of industrial peace, then in the long run one might suppose that a reduction in all strikes would occur. The presumption is that the parties would learn to iron out differences in conference. But in the short run, one would expect that any analysis of the strike picture would demand concentration on union organization disputes, since it is primarily to union organization matters that the Act is directed. But not all organization disputes are covered by the Act. The Act provides no power to prevent closed-shop disputes; only recognition and discrimination disputes would be expected to decrease because of the National Labor Relations Act.<sup>19</sup>

Chart D (p. 425) shows the number of strikes and man-days idle from 1927 through 1939. The number of strikes and man-days idle

<sup>19</sup> The Act operates only in industries in interstate commerce. When firms are intrastate in character, the Act can operate only indirectly to reduce strikes. However, most industries are subject to the Act. As classified in the Board's Fourth Annual Report, those industries subject to the Act are Iron and Steel; Machinery; Transportation Equipment; Nonferrous Metals; Lumber, Stone, Clay, and Glass; Textiles; Leather; Food; Tobacco; Chemicals and Allied; Paper and Painting; Rubber Products; Miscellaneous Manufacturing; Mineral Extraction; Water Transportation; Telephone and Telegraph; Radio Transmission; Wholesale Trade; Fishing. Not subject to the Act are Motor truck Transportation; Motorbus Transportation; Taxicabs and Miscellaneous; Electric Railroads; Steam Railroad; Other Transportation; Retail Trade; Domestic and Personal Service; Professional Service; Building and Construction; Agriculture; Other Agriculture; Fishing, etc.; W.P.A., Relief, etc.; Other Manufacturing; and General Strikes.

began to increase in the early thirties, but the increase following the "New Deal" is noticeable.

CHART D. NUMBER OF STRIKES AND MAN-DAYS IDLE PER YEAR

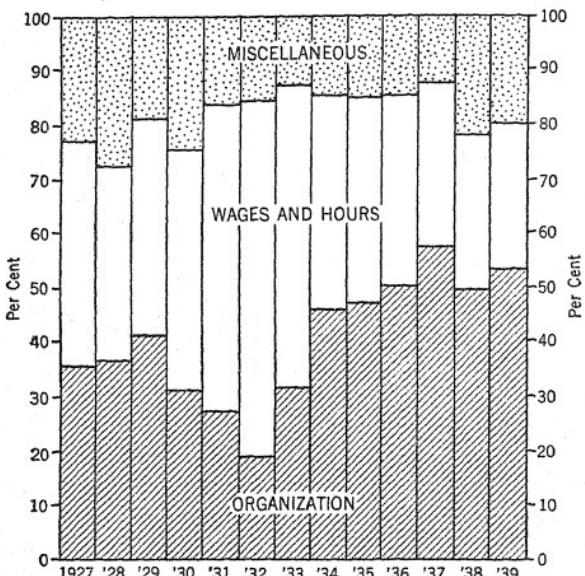


SOURCE: U. S. Bureau of Labor Statistics, *Strikes in the U. S. 1880-1936*, Bulletin No. 651; *Monthly Labor Review*, May, 1938-1939-1940.

Charts E and F (pp. 426 and 427) show the relative importance of the major issues in strikes and man-days idle from 1927 through 1939. It is clear that the great depression meant that wages and hours became more important as a cause of strikes and man-days idle, although organization as a cause became a more important issue beginning with 1933. The organization issue was increasing in importance in the number of strikes through 1937, the year when the constitutionality of the National Labor Relations Act was upheld; and this was also true of the man-days idle. The Act may have caused the 1937 figure to be high, for in that year

there were organizing drives in steel, automobiles, and textiles, which drives were in part traceable to the encouragement given organized labor by the Act.

CHART E. MAJOR ISSUES INVOLVED IN TOTAL STRIKES 1927-1939

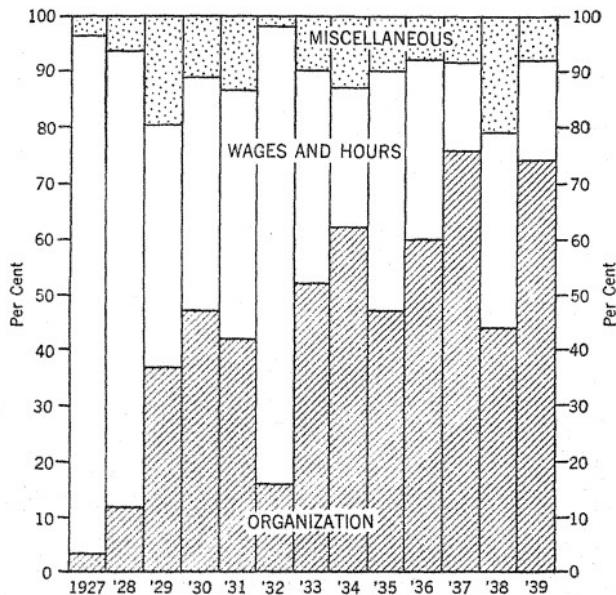


SOURCE: U. S. Bureau of Labor Statistics, *Strikes in the U. S. 1880-1936*, Bulletin No. 651; *Monthly Labor Review*, May, 1938-1939-1940.

Chart G (p. 428) shows the record for strikes and man-days idle where the issue was solely recognition. Between 1927 and 1932 the recognition issue was of growing importance as a cause of man-days idle. Even in the depression the unions were striking for recognition, although there was a low percentage of man-days idle in 1932 for this reason. Recovery and the "New Deal" made recognition a more important issue until 1935 and 1936. Nineteen thirty-seven saw a revival of the urge for recognition; and the proportion of strikes for this reason continued to increase in 1938 and in 1939, although the proportion of man-days idle because of recognition was decreasing. By 1938 perhaps the unions were being accepted more by the employers, so that

strikes for recognition were no longer necessary. The relatively high figure for man-days idle in 1931 was due to the textile and coal strikes. The depression low is prominent, as is the upswing in 1933, probably because of the "New Deal."

CHART F. STRIKE ISSUES RELATED TO MAN-DAYS IDLE



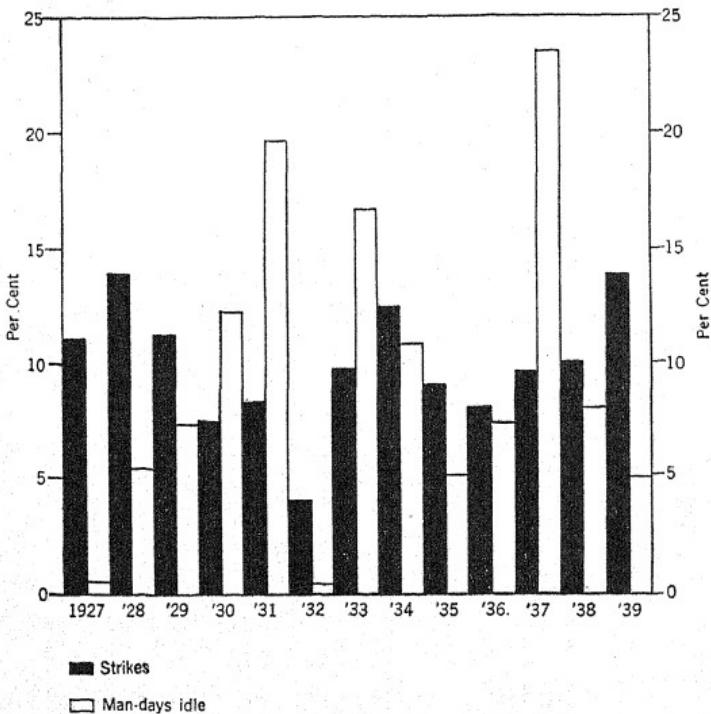
SOURCE: U. S. Bureau of Labor Statistics, *Strikes in the U. S. 1880-1936*, Bulletin No. 651; *Monthly Labor Review*, May, 1938-1939-1940.

Next (p. 429) is shown the per cent of strikes and man-days idle where the issue was discrimination. Employer discrimination was one of the principal reasons for the passage of the Wagner Act; and if the Act succeeds, it would be expected that the discrimination issue in strikes would become less important. Unions carried on strikes because of discrimination in the late 'twenties, although the man-days idle in the period were important in only 1929 and 1930, when organized labor was fairly strong. The depression lessened the importance of discrimination as an issue, then the proportion of strikes because of discrimination increased through 1935. Labor may have believed that the "New Deal" would free

## RECORD AND RECAPITULATION

it from discrimination. The proportion receded through 1938, and it is plausible that organized labor was willing to rest its case with the Board rather than engage in strike activity. The man-days idle due to discrimination have never bulked large, but they

CHART G. STRIKES AND MAN-DAYS IDLE WHERE ISSUE WAS  
RECOGNITION



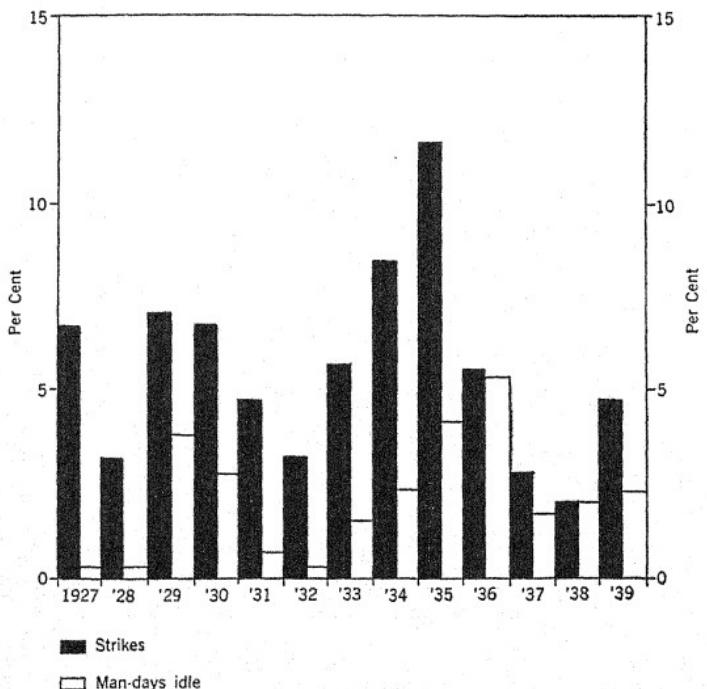
SOURCE: U. S. Bureau of Labor Statistics, *Strikes in the U. S. 1880-1936*, Bulletin No. 651; *Monthly Labor Review*, May, 1938-1939-1940.

increased relatively in importance from 1932 to 1937. The great strike year of 1937 saw relatively few man-days of idleness because of discrimination, but it will be recalled that the proportion of man-days idle due to organization was great in that year.

Chart I (p. 430) shows the proportion of strikes and man-days idle where the issue was the closed-shop. The strike picture dem-

onstrating the importance of this issue was never presented to any congressional bodies, perhaps because to have done so would have militated against the Act. The closed-shop issue was fairly prominent even before the depression, although the strikes were

CHART H. STRIKES AND MAN-DAYS IDLE WHERE ISSUE WAS DISCRIMINATION

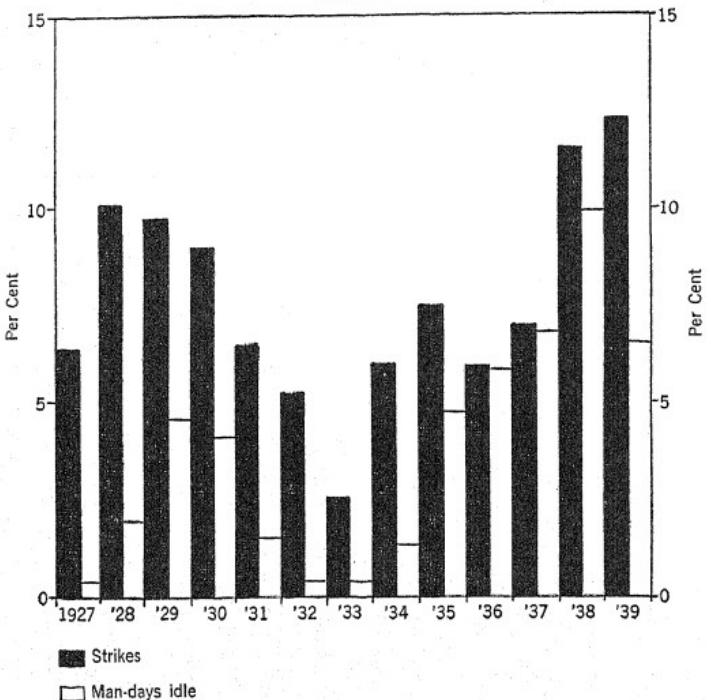


SOURCE: U. S. Bureau of Labor Statistics, *Strikes in the U. S. 1880-1936*, Bulletin No. 651; *Monthly Labor Review*, May, 1938-1939-1940.

apparently small as indicated by the number of strikes and man-days idle. Strikes for this reason became relatively less important as the depression came on. By 1934, however, union power was asserting itself, and the importance of the issue since that year is clear and impressive. The "New Deal" and the National Labor Relations Act strengthened organized labor; and since organized

## RECORD AND RECAPITULATION

CHART I. STRIKES AND MAN-DAYS IDLE DUE TO "CLOSED-SHOP" ISSUE



The per cent of man-days idle for 1939 is 6.5 if the bituminous-coal strike (or lockout) is not included. If it is included, the figure is 49.6.

SOURCE: U. S. Bureau of Labor Statistics, *Strikes in the U. S. 1880-1936*, Bulletin No. 651; *Monthly Labor Review*, May, 1939-1940.

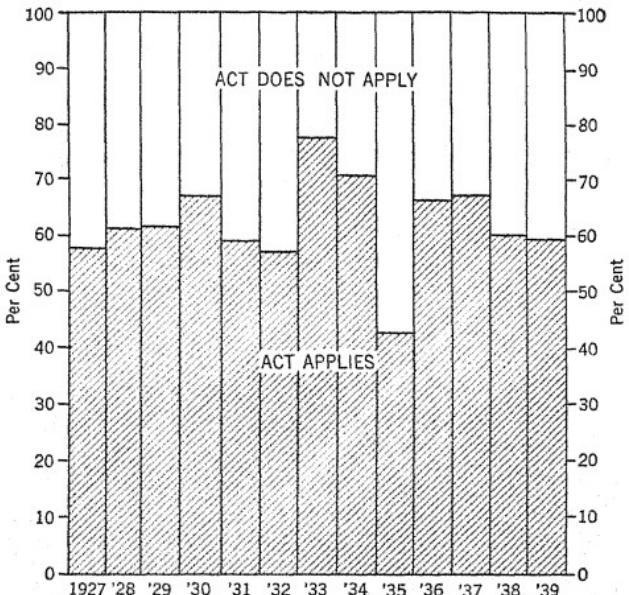
labor has always believed in the closed-shop, the results should occasion no surprise, especially in view of the employer opposition to the closed-shop.<sup>20</sup>

Charts J, K, and L (pp. 431, 432, 433) show what proportion of the total strikes, workers involved, and man-days idle were in industries where the Act applies and where the Act does not apply. The classification is based on that used by the Board. The encouragement by the "New Deal" apparently led to more strikes in

<sup>20</sup> Over half the 7,000 union agreements on file with the Department of Labor in 1939 provided for the closed-shop. Probably three million organized workers were working under closed-shop conditions. The railroad workers work under conditions closely approximating the closed-shop. Bureau of Labor Statistics, Serial R. 1010.

1933 in those industries where the Act applies, although the movement since appears to be downward. This may be due to the operations of the Board. The proportion of workers involved and man-days idle where the Act applies appear to have been declin-

CHART J. STRIKES BEGINNING IN YEAR



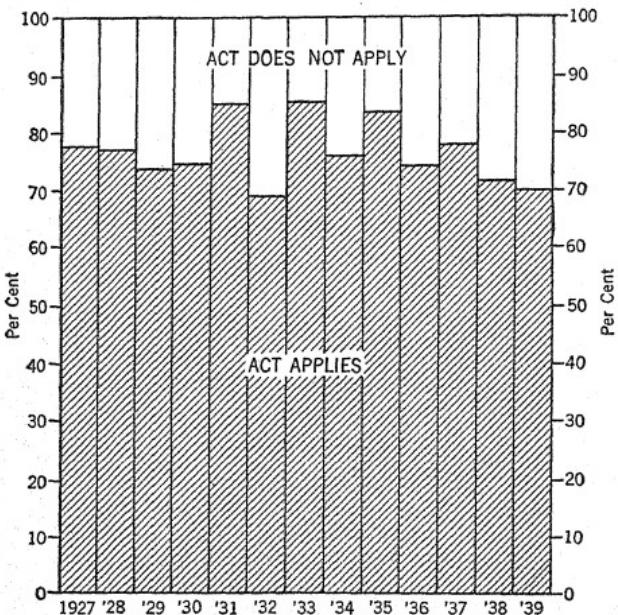
SOURCE: U. S. Bureau of Labor Statistics, *Strikes in the U. S. 1880-1936*, Bulletin No. 651; *Monthly Labor Review*, May, 1938-1939-1940; N.L.R.B. Press Release Z-721 ab.

ing somewhat since the advent of the "New Deal," and it is possible that the operation of Federal regulatory labor boards since N.R.A. days is slowly becoming effective. Nineteen thirty-eight, usually offered by the Board as the first full year of the present Board's operation, shows a definite decline for proportion of strikes, workers involved, and man-days idle; and such declines are probably traceable in part to the Board.

Very important is the next chart (p. 434), which shows a twelve-month moving average of the per cent of all workers involved in strikes because of organization issues, excluding "closed-shop" and "other." The trend is clear and it indicates that, prior to the

*Jones and Laughlin* decision (April 12, 1937) the workers were striking more and more for what they probably regarded as their rights. The average turns down about the time the Supreme Court handed down its decision, and the movement of the average after constitutionality was established indicates that the workers were willing to place their cases before the Board.

CHART K. WORKERS IN STRIKES BEGINNING IN YEAR

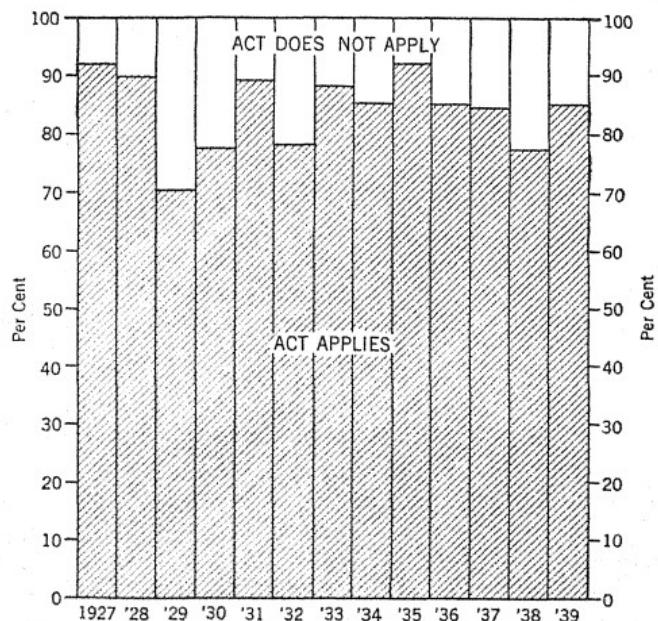


SOURCE: U. S. Bureau of Labor Statistics, *Strikes in the U. S. 1880-1936*, Bulletin No. 651; *Monthly Labor Review*, May, 1938-1939-1940; N.L.R.B. Press Release Z-721 ab.

On the same chart is shown the record of the sit-down strikes. There is a common belief that the *Fansteel* decision by the Supreme Court, which outlawed the sit-down strikes, resulted in the abolition of the sit-down strike. The Act may have been largely responsible for the sit-down strikes that did occur, as a means of enforcing recognition demands, and their disuse probably resulted from adverse criticism by the public, labor leaders, and labor organizations. The date of the *Fansteel* decision was Feb-

ruary 27, 1939, and the sit-down strike had almost vanished by that time. It might be argued that the *Jones and Laughlin* decision contributed to the disuse of the sit-down strike.

CHART L. MAN-DAYS IDLE, STRIKES BEGINNING IN YEAR



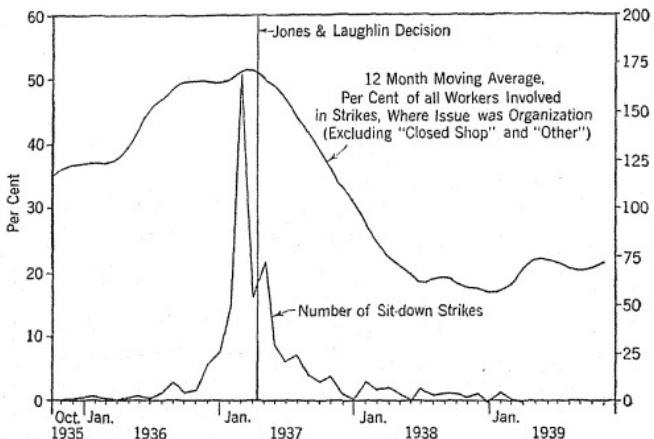
SOURCE: U. S. Bureau of Labor Statistics, *Strikes in the U. S. 1880-1936*, Bulletin No. 651; *Monthly Labor Review*, May, 1938-1939-1940; N.I.R.B. Press Release Z-721 ab.

It appears valid to say in conclusion that the Act has both directly and indirectly been the cause of both more and fewer strikes. It caused strikes in that the reluctance of employers to accept the Act led workers to strike for what they regarded as their rights. The wave of injunction suits which greeted the Act effectively stymied its operation, and there is basis for the Board's argument that the Act had no full-fledged operation until 1938. The strikes caused directly by the Act, such as perhaps the sit-down strikes, may be considered by some as an indictment of the Act, although strikes for the closed-shop pre-date the Act; likewise, the existence of strikes for recognition and similar issues

may be considered an indictment of employers' refusal to obey the law.

The Act probably has been a beneficial instrument for lessening the strike burden where the issue was recognition or discrimination, and this conclusion is somewhat verified by the record in the industries where the Act applies as compared with the record in the industries where the Act does not apply.

CHART M. WORKERS INVOLVED IN STRIKES AND NUMBER OF SIT-DOWN STRIKES



SOURCE: U. S. Bureau of Labor Statistics; *Monthly Labor Review*, May, 1939; Smith Hearings, Vol. III, No. 6, p. 227.

The strike series here used show a rather common movement beginning in 1933 when the "New Deal" came to power. More properly, then, an accurate picture of the relationship of strikes, labor, and government should emphasize the "New Deal" rather than the National Labor Relations Act.

For the future, it seems impossible to predict the effect of the Act on the strike picture. On the one hand, one would expect that agreements will result and increase in number and that the agreements will include machinery for the settlement of grievances without strikes and lockouts. On the other hand, the Act will add to the strength of union organizations; and in the absence of other institutional changes, such as more legislation, the

strike may be used as a bargaining weapon even more often than it has been so used in the past. It remains to be seen whether a reduction in the number and intensity of strikes due to the issue of organization will be offset by an increased burden of strikes for wages and hours, sympathy strikes, and others, due to increased bargaining power. But the record of the strikes for the closed-shop, for example, that have occurred since the Wagner Act was passed does not augur well for strike reduction in the future as unions grow stronger. Nor does the fact that the Department of Labor in 1939 gave recognition to another important strike issue: "Strengthening Bargaining Position."<sup>21</sup>

### C. Strikes Handled and Averted

During the first five years of Board activity the Board was confronted with 2,768 strike cases, involving 441,086 workers, where a strike was actually in progress.<sup>22</sup> Of this total, some three fourths were settled, and 272,136 workers were reinstated following strikes or lockouts. In addition, some 20,370 workers were reinstated following discriminating discharge for union activities. While the Board has not entirely prevented strikes, here it was useful in lightening the intensity of strikes and in bringing about a rapprochement so that production could continue.

The Board claimed that during the first five years it was able, through its operations and influence, to avert 838 threatened strikes involving 192,967 workers. According to the Board a strike is "averted" ". . . when, in the judgment of the regional director, it would have occurred had not the regional office intervened. . . ."<sup>23</sup> It may be true that the Board was able to avert strikes, but it is difficult to know the Board's influence. To assess credit, not only would there need to be an evaluation of the regional office's judgment but also a knowledge of employer and union tactics in each threatened strike. In any event, there probably were many strikes averted for which the Board may justly

<sup>21</sup> In 1939, 0.9 per cent of the total strikes were for this reason. They involved 5.3 per cent of total workers involved in all strikes and accounted for 10 per cent of the total man-days idle during the year. The conclusion just above is borne out by the industrial unrest of late 1941.

<sup>22</sup> N.L.R.B. Press Release R-3258.

<sup>23</sup> Smith Hearings, Vol. II, No. 11, p. 357.

claim credit; and the Board should receive credit for the settlement of disputes through application of the Act.<sup>24</sup>

#### D. Union Organization

A very real result of the Act's operation has been the impetus given to organized labor. Union organizers allegedly used the passage of the Act and the maintenance of the Act's constitutionality to convince hesitant workers that the Federal government desired that they join unions. Not only is the increased strength of unions due to the Act, but also the new strength is partly due to competition in the labor movement, to the organization drives in the mass-production industries, and to the state of general business conditions. Union membership figures alone are not wholly indicative of the strength of organized labor, but they do represent one index. Other indicia are strike activity, changes in wages and hours, and legislative influence.

The table below<sup>25</sup> indicates the activity and membership of the AF of L since 1927, and it indicates roughly some of the Act's effects on organized labor.

Year	Total locals	National and International unions	Local trade and Federated labor unions	Paid organizers	Paid membership
1927	23759	106	365	19	2,812,526
1928	29501	107	373	19	2,896,063
1929	29253	105	388	21	2,933,545
1930	29574	104	348	25	2,961,095
1931	28563	105	384	22	2,889,550
1932	26669	106	307	18	2,532,261
1933	29988	108	673	33	2,126,796
1934	34472	109	1788	55	2,608,011
1935	32645	109	1354	50	3,045,347
1936	33820	111	914	38	3,422,398
1937	30048	100	1406	229	2,860,933
1938	34148	102	1517	118	3,623,087
1939	35307	105	1563	150	4,006,354

The figures available for the CIO are as follows: A membership of 3,718,000 was claimed for 1937, with 32 nationals, inter-

<sup>24</sup> During the last six months of 1940 the Board averted or settled 272 strikes and lockouts. N.L.R.B. Press Release R-4243.

<sup>25</sup> Reports of the AF of L Executive Council to the Annual Convention, 1927-1939, inclusive.

nationals, and organizing committees. For 1938 there was a claimed membership of 4,037,877, with 42 nationals, internationals, and organizing committees, and 675 chartered locals. The CIO claimed over 4,000,000 members for 1939, and 567 directly chartered locals.<sup>26</sup>

From the table showing the AF of L changes, it is apparent that the upward trend in membership began in 1934 when the AF of L showed a large increase in the number of locals, the number of directly chartered trade and federal unions, an increase in the number of paid organizers, and an increase in membership. The figures for 1938 and 1939 probably reflect in part the competition in the labor movement. The CIO figures reflect the organizing drives made in the mass-production industries.

The benefits accruing to the CIO from the Act have been summarized by the president of that organization:<sup>27</sup>

1. The company union was outlawed, and this eased the task of organized labor.
2. The reinstatement provisions provide a form of protection for organization drives.
3. The election machinery set up by the Board eliminates the need for direct action to obtain recognition.

Likewise, the AF of L has publicly testified to the effectiveness of the Act as an aid to organization. Mr. Green testified before the Senate Labor Committee in May, 1939, that ". . . no one can honestly gainsay the fact that the Act has been a principal factor in encouraging unionization.

"That is because it created a new spirit. It made workingmen feel that they were free; free to organize without being the victims of discrimination and injustice. There was the basis of it;

<sup>26</sup> The 1937 and 1938 figures are from *The Report of the President to the First Constitutional Convention of the CIO*, Pittsburgh, 1938, p. 10. The 1939 figures on locals and nationals are from *The Report of the President to the Second Constitutional Convention of the CIO*, San Francisco, 1939.

It is difficult to ascertain the real strength of organized labor. Most important are the two rival organizations, and the figures here cited are their claims.

Early in 1940, N.L.R.B. Press Release Z-721Ce estimated that around one-half million workers were in organizations not affiliated with the CIO or the AF of L. The total union membership in early 1940 was probably between eight and eight and one-half millions.

<sup>27</sup> *The Report of the President to the Second Constitutional Convention*, op. cit., p. 31.

it was a state of mind. The restraining influence of fear was removed, just as it was removed by section 7(a) . . ." <sup>28</sup>

One of the by-products of the AF of L-CIO schism was the encouragement given to unaffiliated unions which, under the protection of the Act, began to grow in importance. Satisfactory statistical evidence does not exist to indicate the growth of unaffiliated unions, but the two leading labor organizations have been uncomfortably aware that the unaffiliated unions were becoming stronger competition.<sup>29</sup>

### E. Trade Agreements

Unions might expect that the Act's most beneficial results after increased union membership would best be reckoned in the number of signed trade agreements. The trade agreement is looked upon not as the labor contract but as the constitution specifying the spirit and procedure of the industrial process insofar as employer-employee relations are concerned. And whether the Act is regarded as primarily to protect the right to organize or primarily to promote unionization, union organization, and collective bargaining, or both, unions would still look to the increased number of trade agreements as an important measure of the Act's effectiveness.

There is no adequate quantitative knowledge of trade agreements in the United States. Even if statistical knowledge existed, it would probably be inadequate for gauging the status of collective bargaining.<sup>30</sup> It is clear, however, that since the Act was

<sup>28</sup> S. Hearings on N.L.R.A., Part 4, p. 631.

<sup>29</sup> The N.L.R.B. annual reports show that unaffiliated unions and individuals filed 7 per cent of all cases on docket during the fiscal year ended June, 1938, 7 per cent for fiscal 1939, and almost 8 per cent in fiscal 1940. In 1939, 434 AF of L affiliates were recognized by employers in situations involving 62,853 workers. In 436 cases, involving 55,790 workers, CIO unions were recognized for purposes of bargaining. Employers recognized 46 unaffiliated unions involving 15,675 workers. As a result of the recognition, AF of L unions entered into 374 contracts, CIO unions entered into 347 contracts, and the unaffiliated unions entered into 44 contracts. N.L.R.B. Press Release Z-721V. It is apparent that, even if the unaffiliated union is growing in importance as is claimed by responsible persons within the major organizations, the unaffiliated union does not as yet constitute a real threat.

<sup>30</sup> Often there is but one agreement between a major firm and a union, and this agreement will cover thousands of workers. Association bargaining differs

passed, there has been a great increase in written agreements. The Board itself, in its Fourth Annual Report, pointed to the settlement of representation questions in 997 instances, which "resulted in collective bargaining agreements, a large majority of which were written." And when discussing restitution made to workers and labor organizations, the Board indicated that "A total of 769 collective bargaining contracts, involving 95,937 workers, were entered into. Of these, 635 were reduced to writing and 134 were based on oral understandings." Negotiations were in progress in an additional 44 cases. During the fiscal year ending June, 1940, there were 880 agreements to negotiate, and 600 written contracts resulted from Board cases. The Board regarded this as a strong tendency toward acceptance of the practice of collective bargaining.<sup>31</sup>

Without a quantitative study, the effect of the Act on increasing the number of agreements may be indicated by citing the industries where there has come about the largest increase in bargaining as evidenced by agreements. The steel industry, formerly the citadel of anti-unionism, since 1937 has become one of the industries where agreements have found favor. Most of the agreements came after the date the constitutionality of the Act was upheld by the Supreme Court. By 1939, over three fourths of the plants in the iron and steel industry were thought to be under agreements; and the satisfaction of U.S. Steel with its S.W.O.C. contract, as expressed by the chairman of the Board, was being widely quoted.<sup>32</sup>

in that there is sometimes but one agreement between the union and the association, sometimes many following cardinal principles laid down in a "master" agreement, as in bituminous coal. Hence, even if it could be ascertained how many agreements there were from time to time, it would be necessary to know also how many workers were covered. This would not be the same as union membership, since often the workers do not belong to the union. Unemployment must also be considered. In any event, the important factor is the effect of the agreements, and hence one must also look at employers not signing an agreement but meeting the terms of competitors who do.

<sup>31</sup> N.L.R.B. Press Release R-4002.

<sup>32</sup> See N.L.R.B. Press Release Z-721.

Mr. Myron Taylor in 1938 said of the year-old S.W.O.C. Contract:  
"The union has scrupulously followed the terms of its agreement and, so far as I know, has made no unfair effort to bring other employees into its ranks, while the Corporation's subsidiaries, during a very difficult period, have been entirely free of labor disturbances of any kind. The cost of a strike—to the corporation,

In the rubber industry, where as late as 1936 there were but few agreements covering relatively few workers, there were in 1939 some 73 agreements covering over 44,000 workers. Eighty per cent of the coverage came after the Wagner Act was upheld in the Supreme Court in 1937.

The electrical equipment industry is another industry where the growth of agreements has been "spectacular." Over 400 agreements were in effect in 1939. In the same category are the industries producing flat glass, automobiles, aluminum, and rayon yarn. The impressive gains have been made in the mass-production industries. Undoubtedly the impelling force came from the CIO's endeavor "to organize the unorganized," but the gains probably could not have been made without the encouragement of the Wagner Act and the protection of the Board.

Collective-bargaining gains have been made not only in the previously unorganized industries but have also increased in coverage where there was strong union organization prior to the Act. Coverage was extended in the clothing industry, newspaper printing and publishing, book and job printing, and machinery industries. Other industries where agreements have been increased in number and coverage are baking, metal mining, petroleum, shipbuilding, silk and rayon, trucking, clay manufacturing, retail meat, lumber and woodworking, electrical utilities, pulp and paper making, and communications.

#### F. Employer and Union Attitudes

Of equal or greater importance than the number of trade agreements is the quality of agreements made. There is some evidence that a new spirit is entering into the agreements, a spirit which no longer looks upon collective bargaining as a legalistic process but one which reflects an increasing acceptance by the employer of what is claimed by organized labor to be its objectives of mutuality and cooperation. Too, the leaders of many unions seem conscientious in their endeavor so to control their organizations as to appear before the employer as a group of workers into the public and to the men—"would have been incalculable."—N.L.R.B. Press Release 2549.

At the end of 1939 the S.W.O.C. had 688 contracts with steel firms covering over 600,000 workers—*Steel Labor*, Vol. IV, No. 12, December 29, 1939, p. 1.

terested in peace and production, although many of the union excesses that were prevalent in the latter 'thirties do not seem yet to have disappeared.<sup>33</sup>

The importance of this new trend is not to be minimized. It is indicative of a better approach to employer-employee relations, and it will enable organized labor and management to devote more of their energy to cooperation and thereby enhance mutual respect and make for harmony. The shift of emphasis from legalism to cooperation will come slowly, for both employer and union attitudes must change. Considerable re-orientation will be necessary by both sides of the bargaining structure, and the difficult problems that are in the offing of cooperative bargaining will demand high industrial statesmanship of both employers' and employees' representatives.

<sup>33</sup> H. F. Browne, in *The Conference Board Management Record*, Vol. I, No. 7, July, 1939, at p. 101 points out:

"Five years ago only a small proportion of companies . . . operated under formal agreements with labor organizations. A growth of membership in labor unions . . . has brought about a marked increase in the extent of collective bargaining.

"Many managements are now having their first experience with collective bargaining . . ."

"As collective bargaining became widespread, many companies became interested in learning how other companies' contracts read, and in comparing their own contracts with those of others . . .

". . . More companies have entered into collective bargaining agreements with unions, and both management and union representatives have tried to profit by errors made in earlier contracts and to take into account situations on which experience has shown that a clearer understanding was necessary or advisable . . ."

"In general, recent union agreements seem to indicate a more serious acceptance of collective bargaining than former ones. The character and wording of the various provisions give the impression of an attempt to construct practical and workable agreements to cover situations that arise in day-to-day plant operation rather than of contracts entered into under duress and couched in such vague terms as to make misunderstanding inevitable and amicable administration difficult.

"Either as a result of this acceptance of collective bargaining or because both parties recognize the drawbacks of too great rigidity, there is a tendency to make these instruments more flexible, allowing a greater leeway in their administration and leaving more matters subject to joint negotiation. Since such a development can only be possible if each of the parties respects and has confidence in the other, the implication is that in some companies, at least, collective bargaining has progressed beyond the preliminary stage of instinctive combativeness. Efforts toward genuine cooperation appear in such provisions as the following: 'To promote the welfare of the company, the union offers to assist the company in the enforcement of reasonable discipline now being practiced by the company in every reasonable manner.' If this is becoming the spirit actuating union-management relations, then a new stage in collective bargaining is in process of development in the United States."

It has been shown above that complaint cases are somewhat reduced. This fact may be regarded as indicative of more employer acceptance of the Act, although caution must be exercised due to the attitude of the unions in handling cases and the attitude of the Board itself in accepting cases and thereby affecting the conclusions one is tempted to draw. The CIO, for example, in its second constitutional convention passed a resolution to the effect that the Act should be used more sparingly because (1) there was too much delay, and (2) the unions were coming to rely too heavily upon the Act.<sup>34</sup> Nor can the number of elections be regarded as conclusive evidence to indicate a change of attitude, since the Board has relied upon the election much more since 1939. Too, increased subtlety by employers in their attempts to oppose union organization sometimes camouflages the real attitude of the employer. Nevertheless, the shift of filed cases away from complaint to representation tends to verify an impression that employers at least are complying in resignation with the Act even if they are not yet accepting the Act in the whole spirit of cooperation. The experience of Board members and of the personnel is that many employers are coming to accept the Act, in the sense that there is no longer the wholesale violation of its principles that there was in the late 'thirties. There is still a fringe of employers who vigorously resist; yet even where there is resistance, it is made more difficult because of the Act. Whereas prior to the Act the employer could and would discharge a worker outrightly for union activity and give that as a reason, today the employer must be more subtle and must engage in devious means of discharging union members.<sup>35</sup> But the employer loses the advantage, even if he succeeds in a discharge for union activity, of other employees knowing why fellow-workers

<sup>34</sup> The resolution also called upon the Board to make fundamental changes in rules and procedure so as to reduce delay, denounced the Board for what was claimed to be wide discharge of unbiased personnel and replacement with personnel favoring the AF of L as a means of "appeasing" the AF of L, opposed the policy of "carving" "craft" units out of "industrial" units, and argued that the Act was to promote collective bargaining and strengthen organization. *Daily Proceedings of the Second Constitutional Convention of the CIO*, Oct. 12, 1939, p. 66.

<sup>35</sup> H. Hearings, F.S.A. Appropriation Bill for 1941, 76th Congress, 3rd Session, Part I, p. 580. Subtlety by the employer who is endeavoring to violate the law may mean to the Board a more comprehensive field investigation and increased complexity of cases going to the courts.

have been discharged, so that even where employers do insist upon violation there are still beneficial results for those workers who desire the protection of the Act. Company unionism has not disappeared and, with employers cognizant of the caution they must have, it is difficult for the Board to remove all such organizations.

Despite the growing volume of complaint cases and the increasing amount of litigation to enforce Board decisions, in 1941 the Board regarded its position with optimism through the fact that a greater proportion of its cases were representation cases. Whereas there was a decrease in the flow of all cases for some time prior to 1940, which permitted the Board to reduce its backlog and approach a current basis, beginning in 1940 the case load increased tremendously, both in complaint cases and representation cases. The very large absolute increase in complaint cases, the increase in employment, and organizing drives by the unions, indicate that the Board still has a great amount of law enforcement work to do, both before and after the decision.<sup>36</sup> But the fact that late 1941 saw representation cases continuing to increase relatively in the total was regarded as a favorable sign, and undoubtedly many employers were accepting the Act.

The experience of the labor boards under the National Industrial Recovery Act, the various types of resistance to the National Labor Relations Act as set forth herein, the long and trying experience of various boards and legislation in the railroad industry, the tenacity with which labor organizations maintain or attempt to better their positions, and the large volume of complaint cases and enforcement problems besetting the Board in late 1941 (after the membership of the Board had been changed)—all lend credence to the suggestion that the attitude of employers toward unionism and industrial peace is but slightly, if at all, affected by the administration of the Act. But insofar as the administration of the Act has annoyed employers and led them to resist the Board, the Board as it existed late in 1941 will no longer have opposition from that source. This is certainly a possibility, although its importance remains to be seen. The Board could "sell" itself at a price too high in light of the Act's

<sup>36</sup> H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, pp. 500-501. .Also see Charts A and B in Chapter XX, *supra*.

objectives; and it must be remembered that the Act applies only against employers, a fact forgotten when pleas are addressed to the Board for "proper" administration. It is difficult to understand just why it would be expected that a large-scale development of unionism could occur without violent repercussions, but criticisms of the Board indicate the presence of such expectation. The future, however, may be brighter:<sup>37</sup>

MR. THOMAS: "Doctor . . . Do you think that the employers of the country and the employees are taking the reorganization as a good sign or as a bad sign, or as an indifferent sign? In other words, just what is the whole picture now, after the Board has been reorganized?"

DR. LEISERSON: "Well, I think since the appointment of a new chairman and these changes that have been announced, that the public opinion of both employers and the unions toward the Board has greatly improved. We get a good many letters so stating, and we have personal expressions of opinion."

MR. ENGEL: "I think one of the difficulties we have had in the administration of the law as written has been the feeling on the part of the employers that this law was a law solely for labor, that is, that the employer had no standing anywhere, that everything the Board has done, and I am not saying that it is true, but everything the Board has done has been done in attempting to stick the employer, and that the employer did not have a chance once he got in before the Board. I think if you can eliminate that feeling, I think you can eliminate a great deal of the trouble this Board has had. I am not saying it is justified, but I think that has been the feeling on the part of the employers.

DR. LEISERSON: "I think you are entirely right, that has been the feeling, but I venture to say that does not need to be the feeling."

"More than that, that feeling is rapidly changing, and with what I think will be more effective administration, I think that feeling will disappear, if not entirely, almost entirely, if you give us a chance to try it out."

MR. ENGEL: "I feel personally, and I think the committee feels, at least many members of Congress I have talked to about the matter feel that way . . . that the solution of whatever problems you have in

<sup>37</sup> H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, pp. 506, 509-510. Italics supplied. Hearings quoted are dated May 6, 1941.

administering this law will depend in great measure on the extent to which the Board can *sell* the general public, the employer and employee, upon the idea that they are judging fairly the issues between capital and labor or employer and employees. If you can sell them the idea that you are fair, I think your troubles are gone."

DR. LEISERSON: "I think we are quite fair and *are selling them that idea.*"

### G. Other Effects<sup>38</sup>

Chairman Madden thought the most important result of the Act has been an extension of what he regards as civil liberties.<sup>39</sup> The right of the employees to organize and to choose representatives was to Mr. Madden as much a civil liberty as is the right of free speech and free press. Only with the passage of the Act and the subsequent operations of the Board did this come to be a reality. This is testified to by the number of workers who vote in elections conducted by the Board, for approximately ninety per cent of those workers eligible to vote do vote in Board elections; and this fact indicates that workers take advantage of the opportunity to select or reject representatives by secret ballot. It was Chairman Madden's opinion that in communities where the right to organize and choose representatives is respected by compliance with the Act other civil liberties are more likely to be respected; and the Act has brought, he believed, a clear improvement in that direction.

Against this gain must be set any restriction of civil liberties because of Board action, such as the supposed violation of free speech. But even if the Board has restricted civil liberties, which is questionable, it is to be remembered that an extension of rights and privileges for one group often results in a restriction of rights and privileges for others. This is not necessarily undesirable as a matter of public policy. Indeed, government as we know it is itself the adjustment of private rights and interests to meet the

<sup>38</sup> No attempt has been made to ascertain the effect of the Act on wages because (1) this study has concentrated on the Board as a quasi-judicial agency; (2) such a study would really investigate the broader effect of unions on wage-levels; and (3) the task would be so great as to merit a separate investigation.

<sup>39</sup> "The most significant result, to my mind, of the operation of the Act, is that it has created a new and important civil liberty and has given new vitality to the old civil liberties." N.L.R.B. Press Release R-2549.

political and economic demands of competing group interests. The Board implements a right which has existed in legal contemplation for a century; the strike statistics, the bargaining agreements signed, the employer and union attitudes, union organization—all may well be counted by some as secondary when compared to the effect of the Act in bringing protection for a long-conceded right.

Perhaps the Board's greatest need, as expressed by Board members and officials, is education of the public generally, and of employers particularly, as to the Act and the Board's operations. It is unfortunate but true that employers usually found their experience with the Board to be far different than their anticipated treatment based upon propaganda and misinformation.

## Chapter XXII. THE COURT RECORD OF THE BOARD

### A. The Amount of Litigation and the Board's Record

Since its inception the Board has been confronted with a tremendous volume of litigation. With the large number of decisions, and litigation arising from other sources, the Board probably has been required to meet its opponents in the courts more than any other agency in a comparable period of time, with perhaps the sole exception of the Board of Tax Appeals. The Board litigation has been broad in scope and character and has included as issues the appropriateness of injunctions issued by district courts, interstate commerce, free speech and free press, Board orders in general, procedural questions, substantive questions, questions of fact, the appropriateness of particular remedial orders, questions of statutory construction, the scope of court review of Board proceedings, and even rules of evidence.

In addition, the Board has been required to engage in necessary litigation where there were "tactical" proceedings for enforcement of Board orders, such as motions opposing applications for stays of Board orders, Board opposition to permission to adduce additional evidence, and other preliminary litigation. Statistics alone are inadequate to reveal the tenacity and legal extremities relied upon by Board opponents, who often consumed years in litigating cases. An example of the lengths to which opposition went may be detailed for one case:<sup>1</sup>

*Bethlehem Shipbuilding Corp., Ltd.,  
v. Howard Myers and the N.L.R.B.*

Bill of complaint for injunctive relief filed April 27, 1936.

Restraining order and order to show cause issued April 27, 1936.

<sup>1</sup> Hearings Before a Subcommittee of the Committee on the Judiciary, U. S. Senate (S. Res. 207), 75th Congress, 3rd Session, pp. 116-117.

Notice of special appearance and motion to quash mailed for filing on behalf of N.L.R.B., May 2, 1936.

Return and motion to dismiss on behalf of Board mailed for filing April 22, 1936.

Restraining order continued May 14, 1936.

Argued before the court May 27, 1936.

Temporary injunction issued pending ruling on motion to dismiss, May 27, 1936.

Briefs filed by the parties on motion to dismiss.

Appeal perfected and allowed June 26, 1936.

By the filing of a petition for appeal, assignment of errors, order allowing appeal, citation, and praecipe.

Motion to dismiss denied July 22, 1936.

Case docketed in circuit court of appeals September 29, 1936.

Printed transcript filed December 18, 1936.

Motion of appellee to defer case until April term opposed; denied December 16, 1936.

Board brief filed December 18, 1936.

Case argued January 7 and 8, 1937.

Decree of district court affirmed by first circuit court of appeals February 16, 1937.

Board petition for rehearing filed February 26, 1937.

Petition denied April 5, 1937.

Motion for leave to file petition for rehearing filed April 19, 1937.

Motion for leave to file petition for rehearing denied May 13, 1937.

Application for stay of mandate filed May 29, 1937.

Petition for writ of certiorari filed in Supreme Court June 30, 1937.

Petition for writ of certiorari granted October 11, 1937.

Board's brief served and filed November 24, 1937.

Case argued before Supreme Court and submitted January 6, 1938.

Decision of circuit court of appeals reversed and complaint dismissed January 31, 1938.

Decisions on the multitude of questions variously presented to the different courts have come down after arguments, briefs, and mature consideration by the jurists of the land; and the victories established in the courts by the Board are a challenge and a refutation to the opponents of the Act and the critics of the administrative agency. The very impressive record established in the courts, probably unmatched by any other administrative agency and indeed by inferior courts' decisions when reviewed by su-

terior courts, is cause for Board opposition to appraise the validity of its criticism. From the earliest court cases involving the issue of Board jurisdiction to the later cases involving the quarrel over standards of due process in administrative proceedings, the Board's record in the courts has been both astonishing and consistent. This outstanding fact, more than any other factor, was the chief defensive weapon of the agency, for a poor court record would surely have been the marginal factor against the Act and the Board. This record may be set forth so as to show in summary fashion both the amount of litigation and the Board's record.<sup>2</sup>

#### A. U. S. Supreme Court

1. Supreme Court decisions involving Board cases:	27
a. Orders enforced without modification	19(70%)
b. Orders enforced with modification	6(22%)
c. Orders denied enforcement	2( 8%)
2. Supreme Court decisions involving other questions:	9
a. Decided favorably to the Board	8(90%) <sup>a</sup>
b. Decided unfavorably to the Board	1(10%)
3. Petitions for writs of certiorari denied:	38
a. Filed by employers or others to review decisions favorable to Board	35
b. Filed on behalf of the Board to review decisions unfavorable to Board	3
c. Petitions dismissed on motion of petitioner (one by Board)	3
4. Supreme Court cases pending ruling on certiorari or final decision:	8

<sup>a</sup> In addition, the Supreme Court denied writs of certiorari refusing to review circuit courts of appeals decisions favorable to the Board in injunction cases. For the above 36 cases involving orders and questions of an important nature, the Board was partly sustained in 17% and was not at all sustained in 8% of the cases.

<sup>2</sup> See Smith Hearings, Vol. II, No. 12, pp. 389-392; Vol. II, No. 13, p. 528; Vol. IV, No. 11, pp. 350-359; Board Release Z-1234. The data go through March, 1941; hence, the favorable record of 1941 is not completely reflected. Since the objective here is to show the final result, cases are counted but once.

*B. U. S. Circuit Courts of Appeals*

1. CCA decisions involving Board orders:	184
a. Orders enforced without modification	95(52%) <sup>a</sup>
b. Orders enforced with modification	58(32%)
c. Orders denied enforcement	30(16%)
d. Orders set aside on constitutional grounds before constitutionally established.	1
2. CCA decisions in injunction cases:	30
All injunction cases, totalling 30, were decided favorably to the Board, with the exception of two additional cases in which the Board was sustained in the Supreme Court.	
3. CCA decisions in cases to review representation cases:	16 †
Decisions sustaining the position of the Board— denying review or restraining order	16(100%)
4. CCA decisions in cases involving interrogatories, depositions, or other attempted inquiries into the Board's internal affairs:	13
a. Decisions sustaining the position of the Board	12(92%)
b. Decisions not sustaining the position of the Board	1( 8%)
5. CCA decisions in contempt proceedings:	13
a. Decisions favorable to Board	8(61%)
b. Decisions unfavorable to Board	5(39%)
6. Other CCA decisions:	3
These cases were all decided favorably to the Board. They involved a petition to review an order of the Board dismissing a complaint, a Board ruling sustaining a regional director's refusal to issue a complaint, and a suit against the Board.	

<sup>a</sup> In some 14 cases the Board itself requested slight modification of the Work Relief Provision of the order; in 8 cases the Court slightly modified the form of notice required by the order.

† Not included are several unreported decisions, in connection with review of unfair labor practice orders, refusing to stay or otherwise interfere with representation proceedings involving the employees of the same employer.

*C. U. S. District Courts*

1. District court decisions in injunction cases:	115
In all cases in which the district courts granted injunctions against the Board, the Board procured reversals in the circuit courts of appeals or, in one instance, in the U. S. Supreme Court. The total of cases in which the district courts sustained the Board's position and denied injunctions comes to about 73 cases.	
2. District court decisions in subpoena enforcement proceedings:	12
a. Decisions favorable to Board—obedience ordered	11
b. Decisions unfavorable to Board—obedience not ordered	1
3. Other district court decisions:	3
a. Decision favorable to Board	1
b. Decision unfavorable to Board	1
c. Pending	1

It may be pointed out that as of February 1, 1940, the Board had been in the courts 101 times in cases involving the question whether the Board had properly assumed jurisdiction under the interstate commerce power, which is the basis upon which it proceeds in a case and which must be stipulated or proven upon the record. The Board's record here is nearly perfect. There was but one case of the 101 where the Board was in error in its assumption of jurisdiction, and that one case was not taken to the Supreme Court. The circuit courts of appeals sustained the Board almost completely on the very complex, very difficult, and very serious contest which raged over the issue of jurisdiction throughout the early years of the Board until the courts' decisions covered so many production situations that jurisdiction came to be conceded.

Through March, 1941, 452 consent decrees had been entered in the circuit courts of appeals, in 104 of which there were modified orders. Because the Act was not at all accepted until its

constitutionality was sustained in 1937, one would not expect consent decrees in the fiscal years ending June 30, 1936 and 1937. There was in fact one decree entered on May 28, 1937. In fiscal 1938 the number of consent decrees increased to 11; in fiscal 1939 there were 147; fiscal 1940 saw 169; and it was anticipated that by the end of fiscal 1941 there would be approximately 218 consent decrees for that year. These figures demonstrate the increasing reliance of the Board on the use of the consent decree.<sup>3</sup>

The increasing number of consent decrees means an increased load for the Board's enforcement attorneys, but in early 1941 the litigation burden was increasing so rapidly—perhaps because defense production saw the law applied for the first time in some industrial areas—that the Board was requesting the Congress to authorize funds for additional attorneys. The increasing burden may be suggested by certain data: On July 5, 1940, there were 201 cases in the litigation section and 108 in the courts; as of March 1, 1941, the section had 179 cases and the courts 109; but as of May 6, 1941, the number of cases in the litigation section was 191, and the cases in the courts numbered 133; and the Board's General Counsel was expecting the "same ratio of increase in succeeding months." Whereas during the fiscal year ending June 30, 1940, 28 per cent of the cases decided by the circuit courts of appeals were submitted to the Supreme Court to obtain certiorari, in the first eight months of fiscal 1941 the figure was 44 per cent. During fiscal 1938 the circuit courts of appeals decisions numbered 27; during 1939 there were 38 decisions; in 1940 there were 63 decisions; and it was estimated that fiscal 1941 would see between 90 and 110 decisions inasmuch as there were 59 decisions in the first eight months of that year.<sup>4</sup> Part of the increasing burden of litigation resulted from the great rush of cases that created a backlog in 1938 and 1939, the decisions of which would often require court enforcement. But the number of cases filed with the Board, combined with the increasing litigation required, leaves one dubious as to the "voluntary" acceptance of the Act.

<sup>3</sup> H. Hearings, F.S.A. Appropriations Bill for 1942, 77th Congress, 1st Session, Part I, pp. 548-553; also, Fifth Annual Report, N.L.R.B., p. 3.

<sup>4</sup> *Ibid.* (Hearings).

## B. Board Comparisons with Other Agencies' Records

The high level of performance of the Board in its litigation work has been compared by the Board with the record attained by other administrative agencies, and the courts. Some of that evidence may be cited here.

*Litigation Record of United States Circuit Courts of Appeals Before the Supreme Court, 1935-1939<sup>5</sup>*

Sixth Circuit: 44.4 per cent affirmed; 55.6 per cent reversed; 0.0 per cent otherwise disposed of.

Seventh Circuit: 42.0 per cent affirmed; 52.0 per cent reversed; 4.5 per cent otherwise disposed of.

Second Circuit<sup>6</sup>: 44.3 per cent affirmed; 51.1 per cent reversed; 4.5 per cent otherwise disposed of.

Third Circuit: 16.3 per cent affirmed; 75.5 per cent reversed; 8.2 per cent otherwise disposed of.

<sup>5</sup> Reputedly one of the finest in the country.

*Litigation Record of the I.C.C. in the Supreme Court, 1892-1901<sup>6</sup>*

The first case involving the Commission reached the Supreme Court in 1892 after the Commission was created in 1887. During the succeeding ten years the record was as follows:

Order of Commission enforced	None
Order of Commission not enforced	10 †
Order of Commission enforced in part	1
Position of Commission sustained	1 †

<sup>†</sup> In one case the Commission was not a party to the court proceeding, which was instituted by an interested party to enforce compliance. *Louisville etc. R. Co. v. Buhlmer*, 175 U. S. 648 (1900).

<sup>‡</sup> Involving the power of the courts to order obedience to subpoenas issued by the Commission.

*Litigation Record of the F.T.C. in the Supreme Court 1920-1929<sup>7</sup>*

The Federal Trade Commission was created in 1914, but the first case did not reach the Supreme Court until 1920. The record for ten years was as follows:

<sup>5</sup> Smith Hearings, Vol. II, No. 13, pp. 516-528.

<sup>6</sup> Smith Hearings, Vol. II, No. 12, p. 393. Two cases are excluded because the Commission was not a party and no order of the Commission was involved.

<sup>7</sup> Smith Hearings, Vol. II, No. 13, p. 516. Decisions relating to orders refer to

Order enforced		3
Order not enforced		11
Order enforced as modified		1
Position of Commission sustained		2
Position of Commission not sustained or (summary)		5
Order enforced or position of Commission sustained		5
Order enforced as modified		1
Order not enforced or position not sustained		11

LITIGATION RECORD, 1926-1938 TERMS.<sup>8</sup> SUPREME COURT'S REVIEW  
OF DECISIONS OF FOUR FEDERAL AGENCIES

	Board of Tax Appeals		F.T.C.		I.C.C.		N.L.R.B.	
	No.	%	No.	%	No.	%	No.	%
Total decisions reviewed	157	100	8	100	57	100	14	100
Supreme Court's disposition of Lower Court's decision:								
Affirmed	76	48	2	25	40	70	5	36
Reversed	80	51	6	75	17	30	7	50
Modified	1	1	..	..	..	..	2	14
Supreme Court's disposition of agency's decision:								
Affirmed	94	60	4	50	41	72	10	72
Reversed	60	38	4	50	16	28	2	14
Modified	3	2	..	..	..	..	2	14
Lower Court's disposition of agency's decision:								
Affirmed	68	43	2	25	37	65	4	28
Reversed	85	54	6	75	19	33	10	72
Modified	4	3	..	..	1	2	..	..

### C. Factors Relating to the Court Record

The tremendous amount of criticism regarding the Act and its legal validity, and the abuse heaped upon the Board for its in-

cease and desist orders. The "position" cases refer to the meaning or application of the Statute. The American Tobacco Company Case of 1927 is excluded because the court did not pass on the merits but affirmed the circuit court's decision setting aside the Board order on the grounds that certiorari was improvidently granted because the case was not important. The American Tobacco Company Case of 1924 is included.

<sup>8</sup> Data consolidated from Smith Hearings, Vol. II, No. 13, pp. 518-519.

terpretation of the Act and its enforcement of the statute supposedly in violation of all the standards of due process, lead to a consideration of the factors that operated to produce the excellent court record compiled by the Board. Discounting fully the magnification provided by special interest groups and proceeding on the basis that a judgment tempered with perspective may still be improved by more knowledge of the court's reasoning processes, the following factors seem decisive:

(1) The statute itself is a model of congressional craftsmanship. The Act is short, precise, and definite. It states with clarity the areas of jurisdiction of the agency and the courts, and it specifies particularly and generally the proscriptions.

(2) It is fair to say that the Supreme Court has been sympathetic to the objectives which, indeed, as even the Court has pointed out, are and have been long recognized. The five test cases were upheld by the Court in 1937, prior to the New Deal appointments to the Court; and enemies of the Act and Board are thereby prevented from claiming "New Dealism" as the reason for the court record of the Board. The newer appointees to the Court, however, are not of the school which would hedge the administrative agency with such judicial restrictions as to render it impotent.<sup>9</sup>

(3) The circuit courts of appeals tend to follow the Supreme Court; hence as Supreme Court decisions are issued to settle various questions, the pace and course are set for the circuit courts. This is evident in circuit court decisions of Board cases.

(4) The Board exercises great care and caution in choosing the cases which are to go to the courts. Pressure has been so great, and the relationship between court decisions and compliance so direct, that the Board had to be certain of its position.

<sup>9</sup> In February, 1937, the Supreme Court was composed of Chief Justice Hughes; Justices Roberts, Stone, Brandeis, Cardozo, Butler, Sutherland, McReynolds, and Van Devanter. Brandeis, Stone, and Cardozo were by many regarded as "liberal," Hughes and Roberts were regarded as the balance, and the remaining four were deemed "conservative." In February, 1937, President Roosevelt recommended a reorganization of the court system, including the Supreme Court. In April, 1937, the Supreme Court sustained the Board in the *Jones & Laughlin* decision. It has been said that the Court's decision reflected the Court's fear of possible consequences if it did not sustain the legislation, both in terms of representative and peaceful government and with regard to the Court's possible loss of the power of judicial review.

This caution is very much related to the "due process" exercised by the Board and is not unrelated to the settlement section and the cases handled by it.

(5) The form and procedure by which the Board reaches its decisions, and which is impressive to the courts, was originally organized and directed by an able and competent jurist who was fully cognizant of the judicial pitfalls and who later was appointed in a circuit court of appeals. It must be said that the competency of the Board's legal staff has been an outstanding factor, and the credit for the selection and performance of the legal staff must go to the Board's General Counsel and Associate General Counsel. A favorable condition for the legal staff was, it is thought in some quarters, a "closed compartment" refusal by the Board's legal opposition to believe that the Act would stand, which error led the opposition to present anachronistic defenses.

(6) The Board kept a very close and accurate check on the records prepared for the courts, and all records and decisions have recognized the courts as a following stage.

## Chapter XXIII. LABOR RELATIONS AND PUBLIC POLICY

### A. State Labor Relations Laws

One result of the passage of the Wagner Act was the enactment of labor relations laws by certain state legislatures. Such laws were patterned after the national legislation, and labor boards created by state laws were empowered to do for intrastate commerce what the National Labor Relations Board was doing in interstate commerce. The problem of interstate commerce v. intrastate commerce could have been a source of conflict between state boards and the National Labor Relations Board, but no such result occurred because of the cooperative efforts of the boards in both jurisdictions. Administrative procedure and the application of principles were fairly common to both the National Labor Relations Board and the state boards, especially between 1939 and 1940. Between the state boards and the national board there was informal transfer of cases, with a minimum of delay and misunderstanding, whenever a case was jurisdictionally in error. By 1941, some of the state boards were handling representation cases (elections) over which the national board might properly assert jurisdiction; yet where all parties accepted the certification of the state agency the national board did not hear of the case. Only in the event that there was irregularity charged in a proceeding where the National Labor Relations Board might properly have jurisdiction would the national board investigate and render a certification. The extent to which the state agencies' certifications were honored by the National Labor Relations Board may be indicated by pointing out that where, say, a one-year agreement resulted from a proper and unprotested certification by a state board, the National Labor Relations

Board would have honored that agreement and refused to proceed to a new certification until the agreement expired.<sup>1</sup>

Attention may now be turned to a brief consideration of some state laws pertaining to labor relations. Similarities to and departure from the national legislation will be evident.<sup>2</sup>

### *Utah*

Utah, in 1937, was the first state to enact labor relations legislation. The Industrial Commission serves as the labor relations board, handles intrastate controversies which affect intrastate commerce or the orderly operation of industry, and enforces a law which is comparable in both substance and procedure to the National Labor Relations Act.

### *Wisconsin*

In 1937 Wisconsin enacted a labor relations act which was patterned after the National Labor Relations Act, although the Wisconsin Act provided for arbitration and conciliation. This Act was repealed in 1939 when the Employment Peace Act, which departs from the National Labor Relations Act, was enacted. The Peace Act protects the employees from the same practices proscribed by the Wagner Act; but in addition it is made an unfair labor practice for the employer to violate the terms of a bargaining agreement, to refuse to accept and abide by the final determination of a properly constituted tribunal, to engage in the check-off without individual order, to employ spies in labor relations, to make or circulate a blacklist, or to commit

<sup>1</sup> See Second and Third Annual Reports, N.L.R.B., and H. Hearings, F.S.A. Appropriation Bill for 1942, 77th Congress, 1st Session, Part I, pp. 502-504.

<sup>2</sup> Sources here used were: Utah Labor Relations Act, Chapter 55, Session Laws of Utah, 1937, and Utah Labor Relations Board, Rules and Regulations, 1937; Pennsylvania Labor Relations Act, Act No. 294, June 1, 1937, P. L. 1168 as Amended by Act 162, June 9, 1939; Minnesota Labor Relations Act, Mason's Supplement 1940, Sections 4254-21 to 40, inclusive (Laws 1939, Chapter 440 as Amended by Laws 1941, Chapter 469); Wisconsin Employment Relations Board, Wisconsin Statutes, Chapter 111, 1939, and Annual Report, Wisconsin Employment Relations Board, July 1, 1940; New York State Labor Relations Act, Chapter 443 of the Laws of 1937, Article 20 of the Labor Law as Amended, and Report of the New York State Joint Legislative Committee on Industrial and Labor Relations, Legislative Document (1940) No. 57; The Commonwealth of Massachusetts, Labor Relations Commission, Chapter 345; U. S. Bureau of Labor Statistics, Serial No. R. 1012.

any crime or misdemeanor in connection with employment relation controversies.

The Wisconsin Act is bilateral in that ten different unfair labor practices by employees or labor organizations are listed and prohibited. These practices include coercion and intimidation of employees in the enjoyment of their legal rights to engage in or to refrain from engaging in union activity; <sup>2</sup> violation of the terms of a collective agreement; sit-down strikes; and activity relating to strikes, picketing, and secondary boycotts.

The Peace Act created the Wisconsin Employment Relations Board, a separate entity, which enforces the Act. The board may issue final orders which are not self-enforcing, requiring the violator to cease and desist and to take such affirmative action as the Board may deem proper.

The law permits the order to suspend for no more than one year the rights, immunities, privileges, or remedies afforded the violator by the Act. The Board also certifies representatives selected through secret-ballot elections, from which are barred employees found guilty of unfair labor practices. The unit determination is left to the employees, and either employees or employers may petition for an election.

In unfair labor practice cases, the Board only hears and weighs the evidence in the case and renders a decision thereon; and no investigation and prosecution functions are carried on except as a final order needs enforcement. Also, in such cases the proceedings must be governed by the rules of evidence prevailing in courts of equity.

In addition to the functions indicated, the Board is given broad powers of arbitration and mediation. These powers, considered with the rest of the Peace Act, seem to justify the conclusion that Wisconsin has erected a labor court.

### Pennsylvania

Pennsylvania enacted a miniature Wagner Act in 1937. The law was considerably amended, however, in 1939. In addition to the original proscriptions against the employer, it was made an

<sup>2</sup> In *Imp and Bohachef v. Christoffel and Allis-Chalmers Workers' Union*, the Wisconsin Board found the union guilty of unfair labor practices. The union was ordered to cease and desist coercing or intimidating employees or employers and was ordered to post notices regarding employees' rights and future activity.

unfair labor practice for the employer to check off union dues in the absence of a majority authorization plus individual authorization; and the closed-shop provision was modified by requiring that, when such an agreement was made, the union should not be closed to persons then employees of the employers.

The amended Act enumerates unfair practices by employees, labor organizations, their officers or agents. The employee's right to join or refrain from joining a labor organization is specified; and intimidation, restraint, or coercion by force or violence against that right is made an unfair labor practice. Other such practices are the participation in a sit-down strike, and the use of intimidation, restraint, or coercion against the employer, through use of force and violence, to compel the employer to meet demands.

The Board also holds elections and certifies representatives. The amended law provides that if the majority of a craft union desires to bargain as a craft unit it shall be certified as an appropriate unit. The Board may, and upon request of the labor organization, the employer, or a group representing at least thirty per cent of the employees in a unit, must investigate and certify representatives to resolve a controversy. Certifications are binding for a period of one year, or longer if a resulting contract so provides. It is of interest to note that the amended law provides appeal from "any certification although not a final order," and thereby avoids what is sometimes regarded as a deficiency of the Wagner Act.

In proceedings before the Board, the rules of evidence prevailing in courts of law or equity are to be followed but are not controlling. Board orders may require *reasonable* affirmative action to effectuate the policies of the Act, including reinstatement of *employees discharged* in violation of the Act. *Reasonable* reports may also be required, and back pay is limited to six weeks prior to the time of filing the complaint. Cases are prosecuted not by the Board but by representatives of labor organizations or the employee filing the charge. The Department of the Attorney General, at its discretion, may prosecute the case or aid in its prosecution.

The law provides that charges of employer domination are not to relieve the Board of handling representation cases, and no peti-

tion or charge is entertained which relates to acts occurring or statements made more than six weeks prior to the filing of the petition or charge.

An important portion of the law is the Forfeiture-of-Rights clause whereby is provided a complete defense against the complaint if the Board finds, during its proceedings, that the complainant is guilty of unfair labor practices. In such event, no order shall issue against the charged person.

### *New York*

The New York State Labor Relations Act was passed in 1937 and was patterned closely after the Wagner Act. The Ives Report in early 1940 summarized the results of a thorough legislative investigation of labor and industry relations in the state and made certain recommendations regarding the Labor Relations Act and Board. The important provisions of the Act, as it stood after certain amendments in 1940, may be indicated.

The Findings and Policy laid down by the Act stress "two-sidedness" and the desirability of collective bargaining as a road to economic well-being and specify that only "some" employers deny employees their bargaining rights. Thus state policy is meant to be more equitable and less one-sided.

The Board created by the Act is composed of three members, who devote full time to their duties. They have complete authority in their area of industrial relations. While the law provides that the Board shall make no effort to mediate, conciliate, or arbitrate a labor dispute, it also specifies that such provision is not to prevent the Board from voluntary adjustments and compliance with the Act in accordance with its purposes and policy.

The stated rights of employees are similar to those in the Wagner Act, but in addition there is a statement that employees may confer with the employer during working hours, provided the employer does not attempt, directly or indirectly, to interfere with the employees' rights. Besides enumerating more specifically the acts listed as unfair labor practices under the National Labor Relations Act, the New York law also proscribes espionage, the preparation or circulation of a blacklist, and refusal to discuss grievances with proper representatives.

The law provides protection for the craft unit in that, by a

majority vote of the employees therein, the craft may be certified as an appropriate unit.

Representation petitions brought by either the employee or the employer must be investigated by the Board, although the Board specifically has no authority in jurisdictional disputes. The Board determines voting eligibility and the election place, procedure, and rules; but no election may be held solely because of employer request or because of the request of employees prompted by the employer. Where three nominees appear on the ballot and no majority results, there must be a run-off election with the two highest nominees on the run-off ballot, and the representative receiving the majority of votes cast is certified. Company unions are barred from the ballot.

The prevention of unfair practices by the Board is similar to that under the Wagner Act. The Board issues cease and desist orders and may order affirmative action which, by legislative enactment, is not limited to certain remedies listed as available.

The Board's investigatory powers and the judicial review under the law closely resemble the powers and review under the Wagner Act.

It is to be noted that the Ives Report condemned cross-picketing and recommended that it be subject to a cease and desist order by the Board, but the amended law as of 1941 included no cross-picketing proscription. The Report refused to recommend without further study the inclusion of unfair practices by unions, such as enacted by other states, and took a similar position regarding notice of intent to engage in a strike or lockout.

The Report gave much space to the separation of "prosecutor, judge and jury" functions; but feeling that an alternative procedure would mean in effect the formation of a labor court and desiring to wait until additional information was available on all state administrative bodies, the Report did not recommend the separation of functions. Indeed, the experience in New York indicated no abuse of powers. Originally the New York law provided that all employees with the exception of the executive secretary and attorneys should be appointed from eligible lists compiled under Civil Service competitive examinations; but when the Board used trial examiners certified as eligible by the Civil Service Commission though not chosen by competitive exami-

nation, legal difficulties were encountered. The law was therefore amended so that Board appointments are in accord with provisions of the Civil Service law and rules, and this action presumably enables the Board to avoid competitive examinations in the selection of competent trial examiners. Such procedure is made necessary because of the unique qualifications demanded of trial examiners, qualifications which can not be ascertained by competitive examinations.

#### *Massachusetts*

The Massachusetts law, enacted in 1937, closely resembled the Wagner Act. A commission, to function as a separate entity, was created and empowered to prevent unfair labor practices and to solve representation controversies. The employer acts proscribed as unfair are those of the Wagner Act, and in addition it is made an unfair labor practice for any labor organization or person to seize or occupy unlawfully private property (sit-down strike) as a settlement lever in a labor dispute. Originally the law gave the same power to the commission in unit determinations as was had by the National Labor Relations Board; this portion of the Act was amended, however, so that by 1940 the unit provision required that a craft unit should be certified as appropriate if a majority of the employees therein so desired. In all other important respects the Massachusetts law followed the Wagner Act.

#### *Minnesota*

Despite the "tradition" that arbitration, conciliation, and enforcement of law cannot be combined, Minnesota, after 1938, developed such legislation. The law established a division of conciliation within the Department of Labor, but the division functions separately. Supervising the division is a labor conciliator, and special conciliators are authorized when needed.

When primary agreements are to be initiated or changed by the employees or employers, written notice must be given the other; and both sides must endeavor in good faith to negotiate an agreement. A strike or lockout may be instituted only after ten days have elapsed following the service of the negotiation notice; then there must also be ten days' notice in writing of the intent

to engage in strike or lockout, served on the other parties and on the labor conciliator. Notices expire at the end of ninety days and must be renewed. The ten-day period enables the conciliator to adjust the dispute, if possible, during that period; and disputants are bound to cooperate through conferences. The parties may petition the conciliator to assume jurisdiction even where there is no notice of intent to engage in strike or lockout.

In disputes occurring in industries having the character of "public interest," the Governor may appoint a commission composed of representatives of employees, employers, and the public, to investigate and render a report on the controversy. The labor conciliator notifies the Governor of the need for such a commission; and for thirty days from such notification neither disputant may make any change in the situation affecting the dispute, and neither strike nor lockout may be instituted. Provisions also authorize voluntary arbitration proceedings. Thus, in no small way the Minnesota statute follows the railway legislation.

The right of both *employees and employers* to associate in their respective groups for collective bargaining is asserted by law. Unfair labor practices by employees are enumerated: To call a strike in violation of a valid collective agreement if the employer is complying in good faith, or to violate the terms and conditions of such agreement; to institute a strike in violation of the Labor Relations Act; to seize or occupy property unlawfully during a labor dispute; to compel or attempt to compel by threats or unlawful interference any person to join or refrain from joining any strike or labor organization against his will, or to assault or unlawfully threaten any such person while engaged in lawful employment; to engage in specified picketing practices.

Employer practices forbidden include: The institution of a lockout in violation of a valid collective agreement if the employer is complying in good faith, or the violation of the terms and conditions of such agreement; the institution of a lockout in violation of the Labor Relations Act; spying; circulation or distribution of a blacklist; encouragement or discouragement of membership in any labor organization by discrimination in regard to hire or tenure of employment, although a provision permits the closed-shop.

Injunctive relief is provided for unfair labor practices, but

such relief is to be resorted to only after all other available means have been tried for the peaceable settlement of the dispute. Moreover, any employer, employee, or labor organization who violates the provisions of the law with respect to labor disputes is not entitled to any of the benefits of the Act respecting such labor dispute.

The labor conciliator investigates representation controversies and certifies the proper bargaining agent. The unit may be the employer unit, craft unit, or plant unit; but there is a provision "that any larger unit may be decided upon with the consent of all employers involved, and provided further, however, that when a craft exists, composed of one or more employees then such craft shall constitute a unit appropriate for the purpose of collective bargaining for such employee or employees belonging to said craft and a majority of such employees of said craft may designate a representative for such unit. Two or more units may by voluntary consent, bargain through the same agent or agents with an employer or employers, their agent or agents." The labor conciliator may use a ballot or other suitable method to ascertain the representatives. Certifications are for year periods unless it appears to the conciliator that there is sufficient reason to consider the matter.

### B. The National Labor Relations Act and Public Policy

The National Labor Relations Board as it existed after 1935 was the culmination of decades of tendencies leading toward a legislative declaration of the will of the body politic that organized labor be protected in its members' individual right to organize and bargain collectively. The investigating commissions had foreshadowed such action, the railroad legislation led the way, the War Labor Board both advanced and retarded the need for such legislation, and the great depression of the early thirties provided the social setting and social drive for legislative action. The character of the legislation emanated from the experiences and social-mindedness of a small group, and it was patterned after other administrative agencies rather than built up from experiential struggles. Indeed, it may be said that one of the reasons for the convulsive experience of the Board in its rela-

tion to the economy was the absence of experience and the abruptness with which the employer-employee relationship was lifted from the category of governmental indifference and deposited in the category of an industrial realism, which recognized man-made institutions, conditions, and the necessity of policing.

Actually the present National Labor Relations Board in thought, in personnel, and in political contemplation began in 1933 with the National Labor Board. It was followed by the first National Labor Relations Board, which in turn saw itself continued and transformed into the present agency. The extremely nebulous character of the National Labor Board and the improved but still powerless functioning of the first National Labor Relations Board not only indicated the indecision of the Congress and the administration as to what the labor policy of the nation ought to be, but this very uncertainty was reflected, too, in the legislation itself. Section 7(a) of the N.I.R.A. was to protect union organizers so that men could organize as they saw fit, and probably coexistent was an honest but less pressing desire to remove the sting and taint of company unionism. There was inadequate anticipation of the difficult issues which would arise, and there was no studied, calm, and unhurried consideration of a rounded public policy. The National Labor Board endeavored to protect rights, but its attention was directed primarily to the settlement and adjustment of disputes. The expansion of regional offices to meet widespread industrial unrest and the rules and principles laid down by the National Labor Board were tremendously important not only for the development of mediation and conciliation, but also for the development of continuous and impressive agreement among the Board personnel as to the legislation needed in order to establish what that personnel regarded as proper employer-employee-state relationships. Thus, public policy, which was later to be enacted, was to be the legislative declaration of the advices and judgments of a small group of sophisticated and experienced men in the field of labor relations.

The Wagner Labor Disputes Bill and the National Industrial Adjustment Bill looked toward machinery, not primarily toward the protection of industrial rights; and such machinery was envisaged as the means whereby industrial peace would be pro-

moted. Public Resolution No. 44, which recognized the need for protection of the right to organize, contained provisions for arbitration. The Board created under the resolution regarded itself as a supreme court to determine final policy, while the regional offices were to apply the determined policy to the facts of particular cases. And this Board really continued and expanded the policies developed by the National Labor Board. But the Wagner Act, when passed, ignored altogether any machinery for the settlement or arbitration of disputes, an interesting finale of development which, at its legislative origin but two years prior, had emphasized settlement and adjustment and for the most part saw protection as an incidental function.

This conclusion was reached presumably as a result of experience pointing to need. It was argued then that protection was a primary consideration and that protection and machinery for the settlement of disputes could not be joined in the same body because there would be loss of faith. In this rather old argument it is never quite clear just *who* would lose the faith; and because departmental strategy is injected into public policy considerations, the argument against protection and settlement functions being combined in one body does not convince. Indeed, the settlement work of the Board, both prior to and after the issuance of the complaint, clearly has been worth while and successful; and all criticisms that have been based upon settlement by the Board are related not to the function of mediation and conciliation but rather to the character and nature of the administration and the *alleged* misuse of settlements as a lever of enforcement. What is desirable and what is needed are not a narrowing of Board functions but the expansion of them, and for that there should be legislative enactment as an expression of public will to support the agency in its attempt to bring industrial peace.

In a real sense, the Board's arbitral character can not be avoided; and this is true because of the very nature of the Board's task. If the functions of the Board were to be expanded by legislative recognition and approval of the combination of arbitration and police, there would be completed the inadequate and incomplete task that was begun by the Congress in 1933.

Labor legislation quite obviously will never be finished, but a close study of the Act does indicate certain areas where Congress

failed to give sufficient and understanding consideration from the very beginning. Indeed, the Administration under whose protection the Act was passed never itself clearly determined to its own satisfaction just what the public policy should be. No more forceful demonstration of this uncertainty and deficiency of public support and legislative knowledge can be indicated than the impression gained by the first secretary of the Board, whose statements describe the indecision and confusion that characterized the Executive and Legislative branches of government when trying to reach and agree upon a public policy of labor relations, even and although the policy was not to be all-inclusive. At the end of the Board's first year the secretary wrote in part:

"It must be borne in mind that the National Labor Relations Act was revolutionary. This fact has had an important bearing on the activities of the Board, and no real understanding of its development is possible without a realization of the break with the past which the act embodied . . . The fact that the National Labor Relations Act was revolutionary is shown, to some extent at least, by the wave of opposition to the act, and the absence of public opprobrium toward those who defied the act. The act embodies the ideals of a group of people, and because it is not something which the general public deeply felt was desirable, but it was something forced into being by a strong lobby, it will not be accepted as law until the Supreme Court declares that it is law. Then a process of education may result in its being considered a good thing and the defier of the act will be, in people's minds, a law breaker."

" . . . The Board has lost some prestige, both with the public, and with the major figures of the administration. It has no real power with Congress or with the President. I believe this result was inevitable, for the Board has functioned for a year without real power, without public support (except from labor, which hoped to gain by its actions, and which has been inevitably disappointed, with a resultant loss of prestige even here), and without support from the leaders of the administration." <sup>4</sup>

Perhaps the Wagner Act ought not to be dignified as "public policy." Surely a "public policy" meant to reflect the thinking of the community on employer-employee relations would include

<sup>4</sup> The secretary's report is in Smith Hearings, Vol. II, No. 16, p. 708.

machinery for the settlement of disputes. When the Congress yielded to the pressure which forced the passage of the Act, it only approved a generally conceded right and created the machinery for enforcing that right without sufficient endeavor to provide for the disposition or resolution of the extremely difficult minority problem. That problem, let it be remembered and emphasized, crops up in relation to the closed-shop issue, the run-off election, the majority rule, and the unit problem. The minority problem is indeed the crystallization of the central controversy that has always plagued the American labor movement, and in the future it will continue to constitute a test of the statesmanship of the most intelligent and sophisticated persons in the field of employer-employee relations.

A legislative statement, if only because in a government grounded in a theoretically tripartite division of powers it *is* a legislative statement, should be enacted which would broaden permanently the powers of the Board. Legislation which would narrow by detail the agency's discretion in the resolution of difficult, complex, and intricate problems arising in employer-employee relationships is not desirable. The legislative branch may also desire to give consideration to the fact that there is no court review where the Board dismisses a complaint; it may, too, wish to give its attention to the fact that there is no court review if the Board refuses to issue a complaint; and there may be a change from the congressional disregard of the fact that there is no court review of representation cases alone. These questions are not really unique to the problems of labor relations, but in an important way they go to the very nature of the relationship of an administrative agency and the administrative process to the judiciary. The presence of such issues clearly demonstrates that broad generalizations regarding the administrative process and particular administrative agencies lose meaning upon analysis; only by close and detailed study of the legislation and the substantive problems involved does any one administrative agency's character lend itself to conclusive statements which, indeed, will become invalid in a short time as the agency, if effective, shifts its policies to meet shifting factual situations.

Further, there was and is need for congressional reexamination of the whole relationship of the employer, the employee, the

union, *and the state*. Probably gone is the notion that the state will not intervene in employer-employee relations. It is no longer a question as to whether or not the state will intervene, but rather what form of intervention the state shall take. The whole development of labor relations, and the place of organized labor within the economy, will be profoundly affected by the attitude, approach, and contemplation of public officers as to the relationship of the state to employers and employees. This detailed study calls up for examination the very important question: Can a Board having the character in contemplation and action such as the Board possesses, be confined merely to protection, or is not such a Board inexorably, by force of events, situations, and fulfillment of its duty to the expressed policy, driven into a broader sphere of activity? And if so, what are the implications? The Board certainly performs in part as a labor court, and its policies do affect the force and character of the labor movement. Is the future of organized labor in this country to be dominated by governmental control from the top down, rather than the development of employer-employee relationships to be the result of a growth from the bottom up? Is the Wagner Act, passed in order to promote what has been described as democratic activity, to be a force which will destroy the democracy it was set up to protect? If the Act continues to succeed it must mean that men will be protected and union organization will be encouraged so that collective bargaining will increase. Collective bargaining must postulate organized groups on both sides, and when this becomes more crystallized the state can not nor will not stand by as an interested onlooker.

It may well be that logically separable legislation should be enacted by the Congress that will be directed toward the excesses of labor unions. It may be that the whole of the employer-employee picture should include more "two-sidedness," to be accomplished, perhaps, by legislation similar to that passed by various states. Union coercion might be tempered by incorporating in the Wagner Act the right "to join or not to join" in place of the present "to join." The miserable practice of cross-picketing may need limitation. It may be that legislation should be passed which would deal with the closed-shop issue and the majority-rule issue. These are all questions which may require separate

legislation, but great caution should be exercised. Already, as a practical matter, the Board is much more in the field of labor relations than was contemplated. If the Board is to be given additional responsibility, it should be in the direction of expanding its powers of arbitration, *broadly conceived*. For the expansion of such power would mean the maximization of discretion for minimum governmental control in the field of labor relations, and better union-management relations would be built from the bottom up rather than from the top down.

The Act's encouragement to the process of collective bargaining has meant that the Board has regarded itself as building a set of precedents and principles as to what is right and lawful and what is wrong and unlawful in labor relations, a kind of common law. This may mean more inflexibility and friction, which in a sense is a price that comes with governmental control. The desirable flexibility in labor relations can be maximized only if the administrative agency seeks the same flexibility in labor relations that it seeks for its own operations. And that must mean a minimum of "precedents" and "principles."

Reliance for the maintenance of flexible adjustment must be placed upon the administrative agency. The judiciary's law-making has demonstrated that reliance can not be placed upon the wholly judicial process to do that which in theory it was never supposed to do. The legislature might, with prescience, detail an enactment to meet all future conditions. It might go to the other extreme and admit inability to deal with the problems. In fact, it has followed the only intelligent course available: It has recognized a broad public objective and relied upon experts to implement the objective. If the legislature erred, it was not in inclusion but in exclusion. Discretion in abundance the Board is now given by the scope of the Act; but the scope should be widened to recognize that labor relations often have need of conciliation, mediation, or arbitration in order best to develop with the maximum of freedom and responsibility. The Board, which is experienced and qualified, is named a *Relations* Board. It could be that if its functions were to be expanded.

## Chapter XXIV. THE BOARD AND THE ADMINISTRATIVE PROCESS

As applied to the Board, the shibboleths of 1940 formed a pungent parade that matched the shibboleths flung at preceding administrative agencies. To justify the destruction of the administrative process, some of the popular phrases revived and emphasized were: "The basic elements of fair play"; "Administrative absolutism"; "Judge, Jury, and Prosecutor"; and "Separation of powers." Such phrases are meant to apply to the tripartite division of powers making up the representative government, for the administrative method of control combines in one agency the executive, the legislative, and the judicial functions. Made necessary by the demonstrated inability of the judiciary to function so as to make law have individual meaning in a social setting where traditional governmental machinery clashed with changing economic processes, the administrative method of control may be in part regarded as an answer to Marxism and a manifestation of the logic that government control may mean not less but more freedom.

Whether such a method of economic control is successful should no longer be a major issue, as unfortunately it seems to be. Present studies of the method should be devoted to searching out weaknesses in order that improvements may be brought. The method will not be improved by divorcing the combined functions, for divorce would only reestablish the inflexibility, the inexpertness, the lack of continuity, and the slowness which constituted the *raison d'être* for the development of the administrative method.

Those who have opposed the Act, and more particularly those who would change the administrative process, have attempted to

characterize the administrative method of control as "judicial," "legislative," or as "executive." But the administrative method of control is, in its entirety and without gaps, a *process*; and as an organic process the method defies a separation of functions into neat categories. Its character is a blend of the tripartite division of powers. This is well demonstrated by the Board.

Unlike some administrative agencies, the Board makes no rules or regulations having the force of substantive law. The substantive law is given and the Board's rules and regulations relate only to practice before the Board and procedure in cases. It can not be said, however, that the Board has no sublegislative powers. The substantive law is stated in the Act, but the statements are broad in character and have been shown to be applicable to situations that the legislative could not and did not foresee. This, of course, is in the best practice of the laws creating administrative agencies, for the legislative, realizing that it can not foresee all possible situations, leaves to the established agency the task of detailed application of the law. Thus, the agency may individualize and particularize cases against a background of statutorily announced public will, and in that sense the Board interprets violations of that portion of the law proscribing unfair labor practices and acts in a sublegislative capacity. Indeed, the annual reports of the Board recount the "Principles Established"; and although such principles are established in adjudicatory proceedings relating to past action, the decisions are meant to establish principles which are for practical purposes commands for the future. The Board is executive in nature in that it administers the law, renders decisions, and carries on the function of translating legislative will into factual operation, perhaps in representation cases, perhaps in unfair labor practice cases, or simply in investigation. Its judicial character is exposed when, upon the record, it makes a decision involving the conflict that arises between private rights and public interests. But it has only judicial *character*—that is, it is *quasi-judicial*, *not* judicial.<sup>1</sup> The Board initiates a proceeding, but once it has made a decision

<sup>1</sup> "A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi judicial character." *Morgan v. U. S.*, 298 U. S. 468 (1936).

upon the record it must rely upon the wholly judicial process to have its decision translated into positive action in the absence of voluntary compliance.

If the administrative method of control is regarded only as combining three categories which, by even the narrowest view, have never been sharply demarcated one from the other; if it is thought that when the Board investigates it is acting in a legislative capacity but not judicial; if the judicial function of the Board is regarded as beginning only when the three Board members sit down with the record; then the whole sweep of the administrative method is lost, and attempts to label certain parts of Board action as "judicial" or "legislative" or "administrative" will lead to befuddlement, misunderstanding, and confusion. The protruding and striking nature of this method of economic control is that there is centered in one informed group the responsibility of determining in light of facts just what the scope of the agency's action shall be in order to effectuate the broadly given public purpose. It would be indeed a burden on the imagination to suppose that an agency, charged by and responsible to the public for the implementation of given policy, would be expected to separate its combined functions in order to be all things to all congressmen; to suppose that, for example, investigation carried on as an "administrative" activity has essential meaning apart from the quasi-judicial function which is the reason for the investigation; to suppose that, even if it were possible to do so, it would be desirable to segregate functions; for the agency is an arm of the legislature and an arm of the judiciary, and it is adjunctive to each as each is to the other. It may be possible to conceive of a stage of the administrative process standing by itself. Perhaps investigation is administrative in character; perhaps a determination of the Board as to a past action, made upon the record, is of judicial character; and perhaps the similarity of treatment accorded similar cases and the continuity of principles in decisions are of legislative character. But that each stage standing by itself is of no major significance, that the *process* is an enveloping entity that has character unique to itself is apparent when it is reflected that no stage is ever dissociated from the preceding or following stages. Once the agency moves at all to regulate, then it moves completely and *in toto*. And if the ac-

tion which gave rise to the movement is resolved prior to the actual decision stage, that would not merit a conclusion that no judicial character was involved in the proceeding. The character of the agency is always present even if not always manifested in action.

In its broadest sense, the administrative method of control means government by experts, law as scientific method. Its essence is skepticism, flexibility, realism, and a recognition of the need for the body politic to realize and comprehend in the fullest sense that the economic processes, the law, and the government are not apart from reality. The urgent and pressing problem that is brought by the administrative method of control is still the struggle that ensues when legal absolutism, with its inability to adapt and its consequent social lags, meets the growing scientific law that is embodied in the administrative process and in the tradition of Holmes, Brandeis, and Cardozo.<sup>2</sup> Emanating from the struggle is the fear that the administrative method of control ultimately must mean "government by men and not by law." Law always must be implemented; government has never been and can not be by law alone; but if it could be, and if the choice had to be made between government by law, which would be atavistic, and government by men in the sense of an extension of the administrative process, then there would be no worthy alternative: The administrative method of control would remain to regulate the economic processes so as to reconcile them to the political institutions which are regarded as desirable.

The prospective growth of the administrative process should cause no additional and undue fear that traditional legal values will be impaired, for the courts as much as or more than ever stand guard over the principle and tradition that is the Rubicon of all administrative control: The right of every citizen to rely upon a court of law to say whether the proper law has been properly applied to the individual and particular case, and the right of every citizen to have the court review the procedure by which the citizen has had his specialized case handled by a specialized agency.

The jurisprudential conflict between legal absolutism and the

<sup>2</sup> "Science" and "scientific" here are used to refer to the intellectual approach of objectivity, not to the classificatory idea of "science."

newer scientific approach had its counterpart within the Board and its interpretation of its task, for there was an intellectual cleavage as to the Board approach. One approach, which was adopted, was to regard the Board's task to be the enforcement of the Act as written, including the statement of the conditions which gave rise to the Act, the ultimate objectives of the Act, and such positive action as was needed. This approach would perhaps mean settlement where possible, but above all the Board would enforce the Act and rely upon the courts to substantiate Board interpretations. Not depending upon sensationalism, and believing in but regarding as useless an educational campaign of employers as a primary means of implementing congressional will, the Board's approach was not conciliatory, mediatory, educational, nor indeed hardly anything but legal, an approach that stamped the Board and characterized its procedure throughout approximately its first five years.

This legalistic approach differs qualitatively from another legalistic approach that refers to the administrative agency reading its act to find limitations rather than powers.<sup>3</sup> Here, with the enforcement objective adopted, the Board searched the Act for powers of action, not for limitations upon its actions. But further, the approach adopted by the National Labor Relations Board was the result of a concern and a realization that the hope and life of the Board in labor relations, and as an outstanding agency of administrative control that cut across all fields of industrial life and therefore carried implications for the future of the administrative process, was to be dependent to a large extent upon what the courts would decide as to the law, how the courts would view the records, and how the procedural processes of the agency would be judged. Not only were the industrial rights of millions of workingmen involved, but the implications that severe court reversals would hold for the entire administrative method of economic control were tremendous. Moreover, the Board's choice of approach was verified and reenforced by the attacks of the opposition. The opponents attacked legalistically, and such an attack can be met only with legal armor.

<sup>3</sup> Cf. James M. Landis, *The Administrative Process*, Yale University Press, p. 75. Dean Landis characterizes as "legalistic" that administrative approach that seeks limitations rather than powers through statute interpretation.

Once launched, the Board could scarcely turn back; hence throughout the first five years came charges of delay, charges that the Board was interested only in legal records and in making such records impregnable, charges that the Board was more interested in its court record than in the resolution of disputes. Came, too, the inevitable realization that even if the Board were acting with legal acumen and legal completeness, if the Board were primarily judicial and only secondarily interested in settlement of disputes, which function the Board was never legislatively empowered to carry on, then the Board and its agents by the nature of the public problem would be driven into the paradoxical position of performing in a manner not judicial and not legalistic. There would be, for example, settlements when a decision had been rendered, or attempts to settle a dispute by mediation. This, of course, was to be the origin of much criticism against the Board: It adopted theoretically the legalistic approach and then factually it often acted in a quasi-judicial capacity, holding, however, ever ready the power to initiate formal action. This is not a definitive explanation of the Board's course of action throughout its first five years; but the Board's direction of movement through its major personalities was based upon the proposition that enforcement was the keynote and investigation was important only because of enforcement, and most of the personnel emphasized the judicial aspect of the Board. It is in that sense that the Board used a legalistic approach. The objective was to build by decision a body of labor law that would apply to labor relations, and this could be accomplished only by legal perfection. But there might also have been the consideration that if the Board were to act primarily as judges and build a body of precedent, then the Board might have been surrounded with more appropriate legal trappings to endow it with the dressing of a court and thereby keep it more in character.

If this legalistic approach is combined with a basic and fundamental interpretation that regarded the Wagner Act as requiring the Board to take positive, forceful, and widespread action in order to maximize benefits, not simply fill breaches, for labor, then the Board's first five years are understandable. If the administrative method of control is characterized by flexibility, by courage, by skepticism, by sophistication, by a determination to be

realistic and read the law so as to permit steps to be taken regarded by the agency as necessary to fulfill the public purpose, without running afoul the courts, then the Board fitted its technique to the conceptual design. In adopting an approach made necessary by the milieu and in reading the law in its broadest sense so as to have justification for positive and forceful action, the Board accepted and carried its stewardship.

Another approach which could have been taken and which gained prominence within the Board near the end of its fifth year would have emphasized investigation and minimized the judicial character of the Board.<sup>4</sup> This approach would probably lead to

<sup>4</sup> In a letter reproduced in the Smith Hearings, Board member Leiserson made clear what he regarded as Board deficiencies: (1) A misconception by the Board and its lawyers as to the basic purposes of the Act; and (2) poor administration. Poor administration was said to result from the fact that the Board was a very large organization with inadequate technical knowledge of management, organization, and administration. There was no efficient system for direction and supervision of the large and scattered staff.

The Board's basic misconception was said to be the view that the Board had prosecuting and judicial functions. Mr. Leiserson wrote:

"We are really a branch of the Congress for investigation and fact-finding purposes similar to the Interstate Commerce Commission. . . . [Congress] merely created the Board for the purpose of investigating and finding whether employers are pursuing the old practices and if they are the Board is given the authority to order them to cease those old practices and to pursue the new practices. . . .

"The Board and its lawyers can't seem to grasp this idea. Essentially they really agree . . . that we do have prosecuting and judicial functions. . . . If I thought that we had prosecuting and judicial functions here I would not trust myself to keep them separate. . . . [The lawyers] have no understanding of the method of inquiry or investigation that we call economical or social research. . . . The lawyers identify the investigation with the hearing; they call it a trial. The actual careful investigation that is done before the hearing they consider mere preparation such as a prosecuting attorney would do.

"The problem is really more far-reaching than the N.L.R.B. itself. It threatens the whole idea of scientific investigation and administrative control. . . ." Smith Hearings, Vol. IV, No. 2, pp. 72-73.

General Counsel Fahy of the Board objected to Mr. Leiserson's view:

"I should like to say generally that in unfair labor practice cases . . . it is my opinion that Dr. Leiserson's views . . . have no relation to reality and are impossible of acceptance. The proceedings required by Congress itself in unfair labor practice cases in the absence of settlement are adversary in nature and cannot be carried through merely by social or economic research. The question is a question of fact in most of these cases as to whether the party proceeded against has committed one of the . . . practices condemned by statute. . . ."

"I admit the necessity, in some cases, and the desirability . . . of social and economic research, but that does not change the character of proceedings in which the person is accused of violating the law to an ex parte investigation, as distinct from proceedings adversary in character. Our unfair labor proceedings being adversary in character, procedural due process must be complied with under the laws

settlement, to conciliation, to mediation. In a sense it would be negative. Probably in the investigation stage there would be more effort exerted to find a basis for settlement. Perhaps such an approach would be flexible and have resiliency. It would also recognize that, on the whole, employers have always been anti-union; and, contrary to the legalistic approach, the education of employers would be an important activity. Labor relations would be less in danger of channelization than they were under an approach which emphasized legal thoroughness and the establishment of principles, and labor relations might better emanate from the bottom up instead of the top down. But such a view would look to the Act not in the spirit of maximum powers and action in order to maximize benefits, but rather to find limitations upon the agency so as to keep it within a narrower sphere of action. If this occurred, then the administrative agency here might lose its character of being a highly resilient, extremely flexible, and mobile method of control, with the ability to move quickly to economic trouble areas in order to bring to bear its powers of interpretation and to promote the public will.

Under this approach the Board's trial examiner might be regarded as having more of an investigative function and less a judicial function; there might be no paradox of the trial examiner's having instructions on the one hand to maintain a judicial appearance, and on the other hand to ascertain the facts by and under the constitution. Therefore, Congress itself provided for a complaint, an answer, and a hearing in which parties could be represented and introduce relevant testimony. . . . Without such hearing or trial the Board could not have complied with the statute or the requirements of due process. Our practice has been built up with this in mind, so as to permit the fullest opportunity for the party proceeded against to know with what unlawful act he is charged and to have an opportunity to defend. . . ."

"To indict the Board or its legal staff for following the requirements with respect to procedure contained in the statute itself and required by the Constitution, by affording a trial is, to me, fantastic. . . .

"Now notwithstanding the adversary character of the proceedings, it is well settled, too, that the combination of the function of prosecution or presentation of evidence with the function of decision in one organization . . . is valid. Our whole administrative law is built upon that premise. So that when the Board as a matter of fairness separates these functions within the one overall organization, it in no sense accepts the premise that there must be a further separation of the functions into separate organizations. . . . The delegation of separate functions within the organization accepts the premise that these functions may be combined in one organization. It does not accept the premise that they must be separated into separate agencies." Smith Hearings, Vol. IV, No. 11, p. 832.

taking an active part in the hearing. The hearing itself would perhaps be regarded as an investigation, not as an adversary proceeding. The legal record might be less important, too, under this approach; and before the courts the agency might find that its record was less impressive. It might follow that compliance with the Act would diminish, for whether one agrees or disagrees with the legalistic approach that was taken, one can not but agree that, more than anything else in the face of the continuous and unfair attacks brought against the Board, the impressive court record has been the one Board triumph that the opposition could not destroy and in the absence of which there would long ago have been severe changes in the Act and the Board. This fact, and the Board's recognition of the risks of any alternative approach, must be offered in support of the agency when criticism is brought that the Board, which employed legal craftsmen who knew but little about labor relations, adopted the legalistic approach.

The investigative approach would give the appearance of moving rapidly rather than slowly, for the legalistic approach endeavored to promulgate principles to be followed as rapidly as cases permitted, while the investigative approach would probably mean attempts to avoid decision-making through effecting reconciliation of the conflicts. The investigative approach might also lead to a better development of labor relations in the sense that cooperation thrives better in a nonlegalistic atmosphere that is not charged with the court cases won or lost. On the other hand, the legalistic approach, which included within it that interpretation which regarded the Act as a mandate to the Board to maximize the benefits offered by the Act, did undoubtedly bring realistic and widespread rights to those whom the Act was meant to protect.

The legalistic approach should not be viewed as a reason for criticism of the Act and of the Board, for most of the opposition would have been present and pronounced whatever the approach would have been; and this is true not only of the Board but also of all administrative agencies at their inception regardless of the scope and intensity of their activity. It will never be clear that positive, forceful, courageous, and independent enforcement of the statute was not the better alternative. On balance and in

retrospect the legalistic approach appears at least as good as, if not better than, the investigative approach. In any event, the Board and its experience have demonstrated that, at least in the labor field, not all administrative agencies fit the neat dichotomy of being either strictly policing or charged with promoting the proper functioning of an industry. The Board began operating with negative character but quickly found that realistic policing meant that it must also promote or encourage practices and policies in one category of all industry, so that the dichotomy was broken down by the merging of policing and promotion activity and the Board's carrying on both.<sup>5</sup>

Each administrative agency is a special case, so that attempts to standardize and generalize are likely to be erroneous. It appears that for the Board the policies formulated can not be the criterion on which to pass judgment as to the Board's stewardship.<sup>6</sup> This agency deliberately worked legalistically; there was no general public support for the Act under which the agency operated; the public's knowledge of the agency, the Act, the record, and the source of the agency's opposition, was small and inaccurate. Policies formulated by the Board were always competing policies; and the Board itself, as well as scholars and others who conscientiously sought solutions, recognized the validity of alternatives. Here it seems that the ultimate judgment as to the agency must hinge at least in part upon the decisions made upon the record rather than upon the formulated policies. And it is only by a close consideration and a greatly detailed study of cases and the internal structure and operation of the Board that it becomes clear that the Board's stewardship has been admirable and that praise is due the agency for its work.

The National Labor Relations Board was not the first Federal control agency in the field of labor relations. It is, however, the most extensive both in function and size, and the policies formulated and enunciated will be more far-reaching than those promulgated by any similar Board in the field of labor relations.

This study has endeavored to portray the many competing policies always confronting the Board, the pressure groups and their interests, the efforts of the Board to meet the demands made

<sup>5</sup> Cf. James M. Landis, *The Administrative Process*, Yale University Press, pp. 16-23.

<sup>6</sup> *Ibid.*, pp. 38-39.

upon it, the ignorance and lack of knowledge by many of those who would abolish or change the Board, the Board's own internal operations, its key personnel, and its turbulent development over the first five years. If judgment must be passed, then it may be said that the Board has carried on and extended the best traditions of the administrative method of control.

### Conclusion

This judgment is not meant to ignore the realities of inadequacies and deficiencies. Some may disagree with approach and interpretation, with management and organization, with policies and principles, with scope and purpose; but all who study the Board must agree that the Board possessed deliberation, studied consideration, courage, honesty, and a laudable independence that ignored properly but respectfully the legislative blasphemy, the blustering of organized labor, and the bleats of both the legal profession and the employers. And it may be said that with realism, discrimination, and sophistication grounded in experience, the Board showed consistently that most of the attacks launched against its procedure were in truth launched against the public policy itself.

It may be true that internal management was grossly inefficient, that internal stubbornness prevented procedural changes that would have improved the immediate handling of cases, and that overcentralization was present and is to be criticized because of the delay that occurred in the handling of cases. But it is also true that the inefficiency was short-run and not long-run, that the Board's short-run inefficiency and overcentralization will yield benefits over years, and that the individualization of cases does not lend itself to mass-production processes and at the same time secure judicial verification and justice for the parties involved.

If there was too much legalism, there were also the splendid court record and too much rather than too little due process.

If the Board was too secretive with employers, it was because it knew from experience that it must be; and the legal "Sword of Damocles" was certainly not original nor unique with the Board.

If the Board employed too many "socially creative" persons, it was because the Board insisted that the personnel be biased in

favor of the Act they had to implement. If too many legal craftsmen were employed and not enough labor experts, it was because the Board chose the legalistic approach and craftsmen had to be employed.

If the Board made enemies of some with whom it came into contact, and it did, it was because of its straightforwardness and acceptance of responsibility and not because of deceit, duplicity, or attempts to effect *sub rosa* and "behind the scenes" arrangements and bargains.

If the Board successfully resisted political pressure, and it did, then that is an achievement that in itself should secure the admiration of impartial observers. If the South's opposition to organized labor manifests itself in influential congressional positions and action, this must not screen the fact that the Board's enforcement of the Act was consistently vigorous everywhere.

If the Board, through its employees, exercised wide discretion, and it did, it was not because it violated the Act but because it read the Act as a mandate to maximize benefits. Even so, the Board's discretion was not undefined but was restricted to the standards set forth in the Act, and the Board had to conform to its own published rules and regulations.

If the Board decisions, and if the formulations of policy which constitute the Board's application of public will to the factual, individual, and particular cases, do not fit the public mind, then undeserved abuse should not have been heaped upon able and conscientious public servants; but rather the legislative branch should have met its responsibility and changed the public policy.

If it is thought that Board procedure was not more than fair and full and did not exceed the requirements of due process as established over the years, then it may be reflected that no less than a full and fair procedure could possibly have withstood the legal onslaught against the Board.

If there was duplication of function within the Board and if attempts to improve internal divisions and operations seem to have come slowly, there were also experience, studied judgment, limited resources, safety, and protection for the accused in such duplication and in the slowness of improvement.

If the Board appeared to be lending its support to organized labor to such an extent that benefits to the individual seemed

incidental, and it did, then that must be laid at the door of the legislative; and that appearance will continue until the Act is changed.

If the Board malhandled the bitter feud between the AF of L and the CIO, it was not because there was no constant endeavor to resolve that mammoth jurisdictional dispute, nor was it because the Board aligned itself factionally or failed in scattered instances to corral properly its own employees. Rather, it was because the union organizations abused the very Act that was passed for their benefit; they made the Board a victim of their own excesses and organizational strife, and they demanded "special interest" legislation.

If the Board made serious errors in judgment, and one would suppose that it did so time and again, it was not because effort was not made to avoid errors; but rather was it the fact that the tremendous burden of cases, over which the Board had small control in light of its selected mandate, would be bound to bring errors, as must occur in any agency or among any group that is endeavoring actively to implement a law.

If the Board may be said to have "created" remedies, which is indeed questionable, it was not because of maliciousness but because the Act and the congressional thought behind the Act demanded that it do so. If blame is to be assessed, then it should go to the Congress, not to the Board.

If the Board was internally weak in its adjudication procedure, it is not apparent in the court record where one would expect to find such evidence. If settled cases resulted from "weak" cases that could not go to court, and some did, this was a deficiency that the Board itself endeavored to correct; and for literally years the Board was deeply concerned to make certain that its internal adjudication was sound and proper.

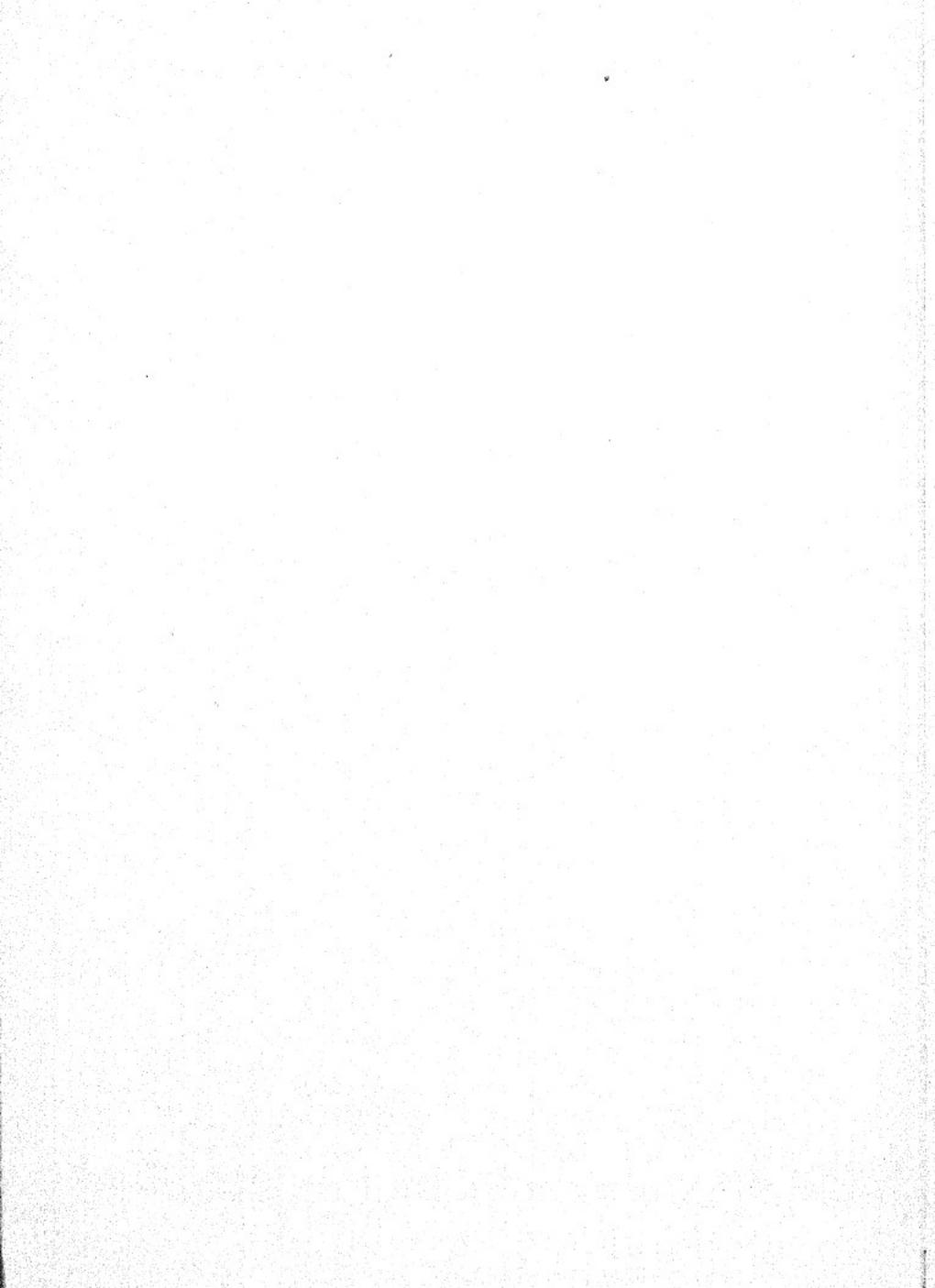
If it is thought that the Board's legalistic approach was responsible for creating friction, it may be remembered that the Board always endeavored to expand its settlement work. That the Board succeeded in this is shown by the cases disposed of informally and by the growing volume of consent decrees.

If the procedure established by the Board was not satisfactory to litigants, and it was not to some, then the criticism should be laid to the Congress and to the courts, for the Board was quick to

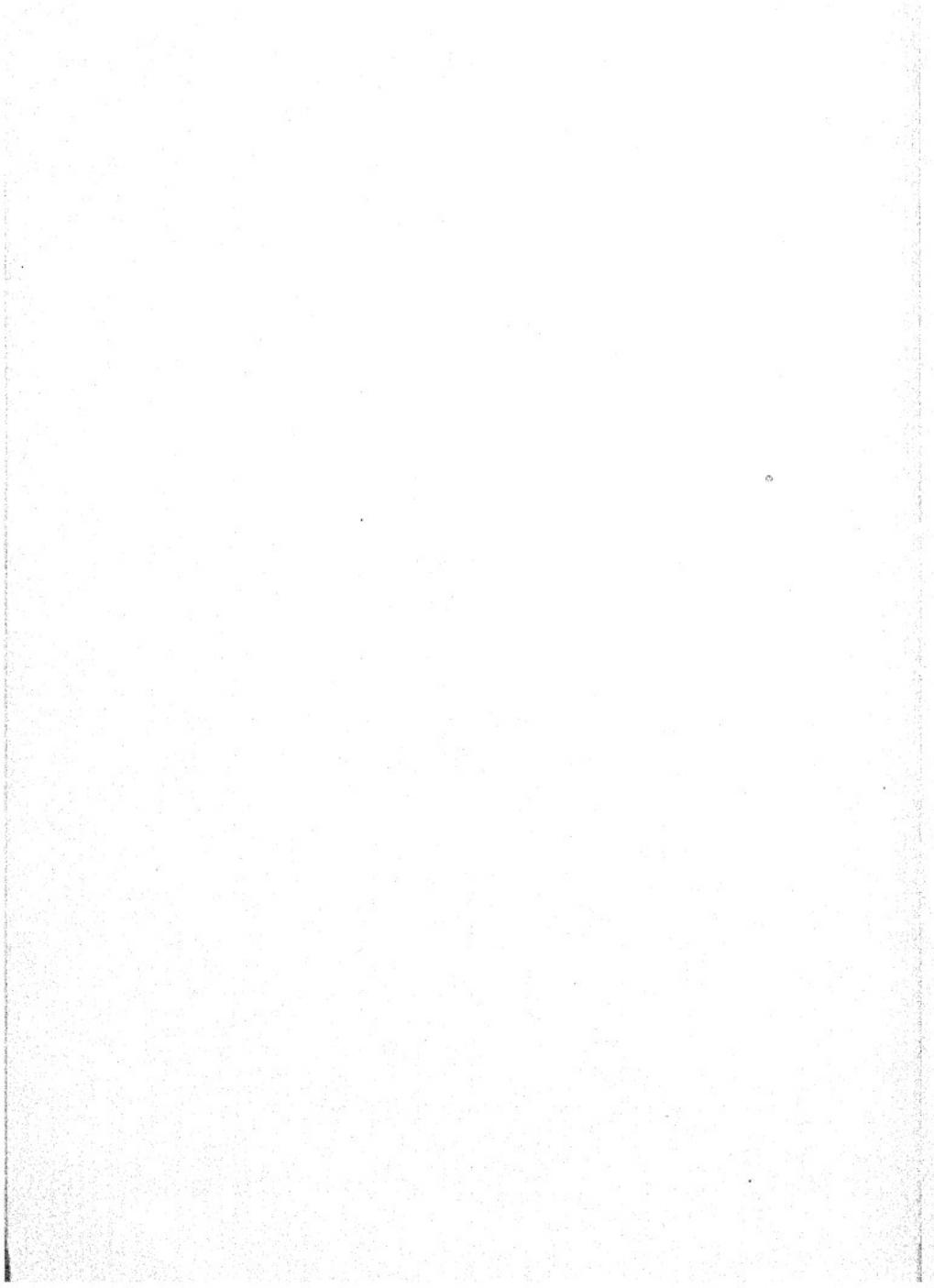
make the details of its legislatively outlined procedure adhere to the courts' attempts to obtain observance of those procedural safeguards which are at the basis of due process of law. And, of course, it is well known that the Board's procedure is not unique to the Board.

If the Board as an administrative agency failed to fit the pre-conceived pattern in the mind of a critic of the administrative process, it was not because the Board unfairly diverged from all administrative agencies but because the only true pattern of administrative agencies is no pattern. Each agency is predicated upon its own unique social and economic facts so that individualization may follow.

If the Board has not acted with mathematical certainty and accuracy, and it has not, it is because the Board has pursued its task with skepticism and probability in a setting of shifting and flexing economic, political, and social movements that would defy any certainty even if the Board had not been charged with a function that must be characterized as essentially uncertain. The Board was pragmatic, it was objective, it was reasonable, and it was realistic. Not only did the Board promote collective bargaining, but also the Board promoted the scientific spirit that would have law and government related to the realism of the "here and now." A positive, active, and objective spirit guiding the adjustment of private rights to public interests under our existing legal and economic institutions was the major contribution of the Board.



## *Appendix*



PUBLIC, NO. 198, SEVENTY-FOURTH CONGRESS  
NATIONAL LABOR RELATIONS ACT

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,*

Findings and Policy

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of

commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

### Definitions

#### SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representative" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances,

labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 8 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133 approved June 14, 1935.

### National Labor Relations Board

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years

each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SEC. 4. (a) Each member of the Board shall receive a salary of \$10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil-service status. All records, papers, and property of the Board, and all unexpended funds and appropriations for the use and

maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary travelling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

### Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment

or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

### Representatives and Elections

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an in-

vestigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

### Prevention of Unfair Labor Practices

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency, or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and

desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency,

the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to

amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

### Investigatory Powers

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue sub-pena requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpена issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account

of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

### Limitations

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 14. Wherever the application of the provisions of section 7(a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707(a)), as amended from time to time, or of section 77B, paragraphs (1) and (m) of the Act approved June 7, 1934, entitled

"An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (1) and (m), as amended from time to time, or of Public Resolution Numbered 44, approved July 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

SEC. 16. This Act may be cited as the "National Labor Relations Act."

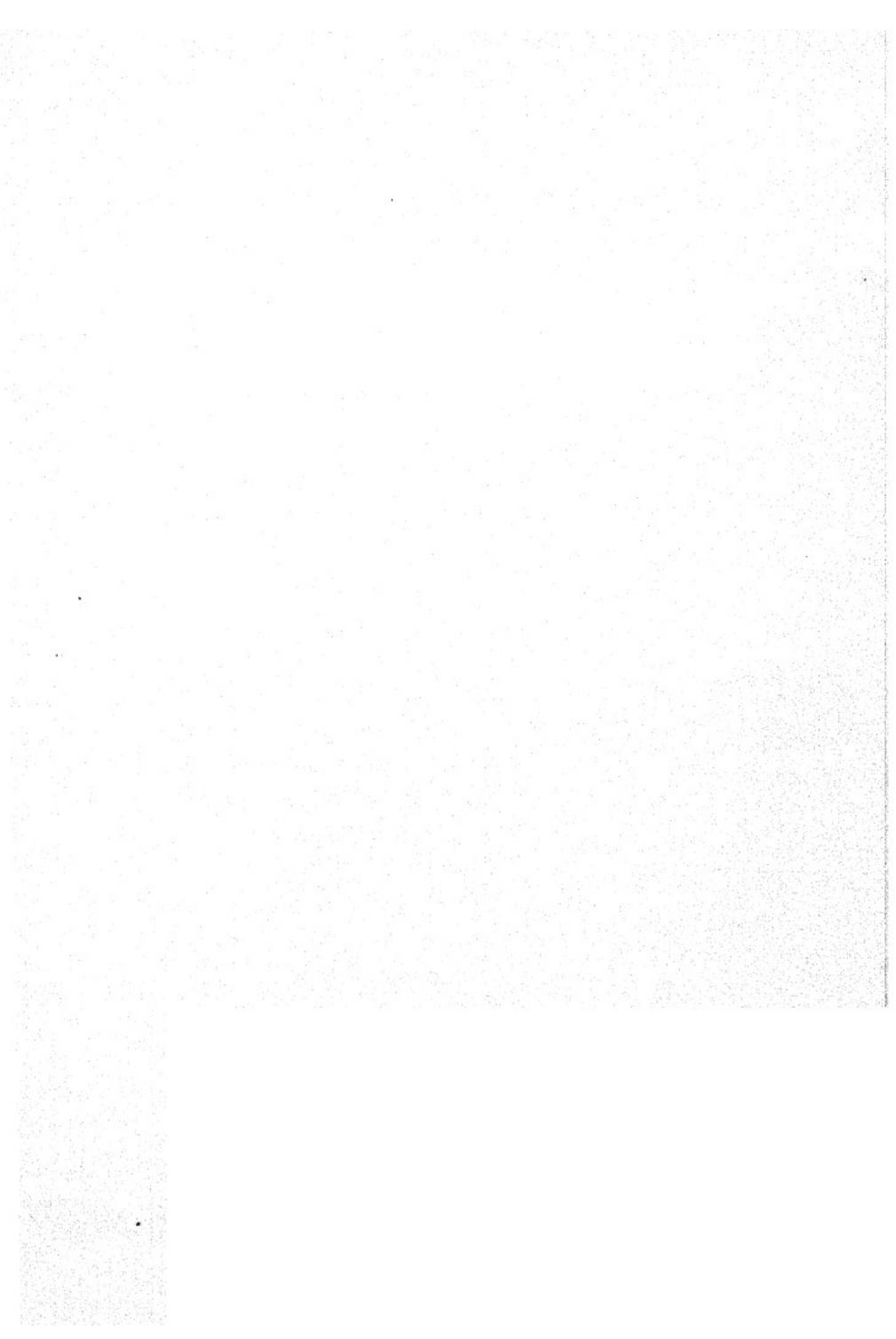
Approved, July 5, 1935.

## INDEX

- Act of 1888, the, 12  
Adair v. United States, 14  
Adamson Act, the, 13  
Administrative Process, the, 100, 225–  
226, 260–262, 267, 295, 352–354,  
387–388, 418–420, 469, 472–482  
AF of L, 23, 24, 26, 28–29, 51, 54, 55,  
96–99, 106–108, 112, 143–148, 152,  
165–179, 187–192, 200, 202–214,  
285, 305–306, 334–335, 341–342,  
360, 409–410, 414, 436–438  
Anthracite Coal Commission, the, 5,  
113  
Appendix, 489–500  
Appropriate unit, 133–134, 160–214,  
217–218, 297, 469  
Arbitration, 12, 15, 32, 35, 36, 40, 52,  
54, 57, 59, 105, 124, 467, 471  
Art Metals Construction Co. Case, the,  
129–130  
Back pay, 83, 90–94, 323–328  
Bankruptcy Act, the, 18–19, 23, 51, 58  
Bargaining contracts, 135–138  
Bargaining unit, 53, 59, 160  
Blacklisting, 114–118, 332–336  
Board certification, 310–314  
Board decision, 281–296, 390–411  
Board hearing, 240–243, 253–272, 306–  
309  
Board opposition, 412–420  
Board orders, 59, 83–100, 215–222,  
315–321, 399–411  
Board members, 339–343  
Board personnel, 339–395  
Board procedure, 59  
Bribery, 70  
Bridgeport Case, the, 9  
Budd Manufacturing Co., the, 31  
  
Carmody, J., 339  
Cases filed, 399–401  
Case statistics, 379, 399–411  
Centralization of procedure, 388–395  
CIO, 98–99, 106–108, 143–148, 152,  
165–178, 187–192, 202–214, 305–  
306, 334–335, 409–410, 436–438, 442  
Civil liberties, 445–446  
Civil service, 375–376  
Charge, the, 225–236  
Clayton Act, the, 4  
Closed-shop, the, 29, 53, 112–114, 206,  
469  
Coercion, 101–106, 470  
Collective Bargaining, 118–130  
Commonwealth v. Hunt, 8, 50  
Company domination, 74–77, 96–99  
Company union, the, 16  
Complaint, the, 236–252  
Complaint cases filed, 399–401  
Compliance, 331–336  
Compromise, 326–331  
Conciliation, 32, 35, 36, 41–42, 52, 54,  
105, 228, 330, 388–389  
Conclusion, 482–485  
Consent decree, 319–321, 331–332,  
451–452  
Consent order, 319–321  
Consolidated Edison Co. Case, the, 100,  
244–248, 265, 279, 280–281  
Consumer's Power Case, the, 145–146,  
220–221  
Court review, 99–100, 215–222, 232–  
233  
Court statistics, 447–456  
Craft unit, the, 169–174, 200, 202–214  
  
Decentralization of procedure, 388–393  
Defense Commission, the, 335–336  
Direction of elections, 139–140, 221,  
310–311  
Discrimination, 77–79, 114–118  
Disestablishment, 95  
Dismissals, 315–316, 405–411  
Disposition of cases, 405–411  
  
Eastman, Coordinator, 17–19  
Economic coercion, 52–53  
Economic pressure, 71  
Economics division, the, 285, 344–355  
Elections, 137–140, 301, 308, 310–311,  
318–314

- Emergency Railroad Transportation Act of 1933, the, 17-19, 23, 28, 51, 58  
 Employee-representation plans, 53  
 Employer attitudes, 440-445  
 Employer petitions, 298-299  
 Erdman Act, the, 12  
 Espionage, 70  
 Exceptions, 282
- Fahy, Charles, 358, 380-381  
 Falk Case, the, 97, 221  
 Fansteel Case, the, 90-91  
 Federal Communications Commission, 84, 226-227  
 Federal Trade Commission, the, 6, 36, 56, 84, 318, 402-403, 453-454  
 Field examiner, the, 372-374  
 "Final order," 215-220, 219-220  
 First National Labor Relations Board, 39-51, 161, 216, 228, 369, 466-467  
 Ford Case, the, 108-110, 280  
 Free Speech and Free Press, 108-112
- Garrison, Dean Lloyd, 52, 210-213, 260-261  
 Globe Doctrine, the, 48, 170-174, 184, 188-201  
 "Government by Injunction," 86  
 Green, William, 24-25, 55, 204, 341, 437-438  
 Greyhound Case, the, 94, 243-246  
 Halleck, Congressman Charles, 294-295  
 H. J. Heinz Co. v. N.L.R.B., 130
- Individual dealing, 72  
 Industrial Adjustment Bill, 36-39, 466  
 Industrial Commission, the, 4  
 Industrial unit, the, 169-174, 200, 202-214  
 Inland Steel Co. Case, the, 128-129, 259  
 Interference, 106-108  
 Intermediate report, the, 254, 272-296, 316  
 Interstate commerce, 61-63  
 Interstate Commerce Commission, 84, 226, 227, 267, 294, 402-404, 411, 453-454
- Joint Resolution No. 44, 38-40  
 Jurisdictional dispute, 204-214
- "Labor Board Cases," the, 61, 414  
 Labor Disputes Bill, 36-37
- Labor relations doctrines, 47-50  
 Legislative pressure, 386-388  
 Lobbying, 386-388  
 Longshoremen's Case, the, 176-178, 181, 196-197, 218-220  
 Leiserson, William, 30, 148-154, 175, 185-186, 192, 195-201, 339-340, 348-349
- Leviton Manufacturing Case, the, 93
- Mackay Case, the, 90, 279-280  
 Madden, Chairman, 95, 111, 117, 154, 169, 173-174, 181, 192-201, 285, 291, 295, 339, 342, 355-356, 445
- Majority determination, 138-140  
 Majority of votes, 142  
 Majority rule, 53-54, 58, 141-159, 206, 469
- Majority voting, 141  
 Massachusetts Labor Relations Law, the, 463  
 Mediation, 13, 15, 32, 42, 52, 57, 105, 228, 330, 388-389  
 Merchant Marine Act, the, 122  
 Millis, H. A., 339, 393  
 Minnesota Labor Relations Law, the, 463-465  
 Modified order, 320-321  
 Montgomery Ward and Co., Inc. v. N.L.R.B., 258-259  
 Morgan Case (first), the, 289-290  
 Morgan Case (second), the, 278-280  
 Multiple-Employer Unit, the, 175-178  
 Multiple-Plant Unit, the, 174
- National Bituminous Coal Labor Board, the, 43  
 National Casket Case, the, 117  
 National Industrial Conference, the, 11, 113  
 National Industrial Recovery Act, 23-28, 113  
 National Labor Board, 28-36, 46-51, 228, 369, 466-467  
 National Labor Relations Act, 489-500  
 National Licorice Company Case, the, 247-251  
 National Longshoremen's Board, 44  
 National Mediation Board, the, 20-22, 122, 150, 185-186, 195, 198, 402-405  
 National Railway Adjustment Board, 21-22  
 National Steel Labor Relations Board, 44

- "Neither" candidates, 142-155, 217-218  
Newlands Act, the, 18  
Newport News Case, the, 97  
Newspaper Industrial Board, 43  
New York Act, the, 171, 183-185, 461-463  
New York State Labor Relations Board, 146-147  
N.L.R.B. v. Express Publishing Co., 88-89  
N.L.R.B. v. International Brotherhood of Electrical Workers et al, 145-146, 150  
N.L.R.B. v. Jones & Laughlin Steel Corp., 61, 90, 125, 346-347  
N.L.R.B. v. Sands Mfg. Co., 125  
Notice, legal, 242-251  
Norris-La Guardia Act, the, 16, 23, 24, 28, 51, 58, 86-89, 105, 113  
"One-sidedness," 101-106  
One-employee unit, the, 166-169  
Oral argument, 282-283, 287, 310  
Public Policy, 6, 17, 42-51, 58, 60, 249, 335, 457-471  
Parties, legal, 242-251  
Penalties, 59, 84  
Pennsylvania Labor Relations Act, the, 460-461  
Petroleum Labor Policy Board, 43-44  
Phelps Dodge Case, the, 100, 117-118  
Pittsburgh Plate Glass Co., the, 174-175, 197  
Political pressure, 383-386  
Posting of Notices, 94  
Pratt, George, 362  
Preferential hiring, 90  
Preferential voting, 148-149  
President's Mediation Commission, the, 6  
Propaganda, 71  
Proportional representation, 35, 37, 155-159  
Proposed finding and order, 278-281  
Proscriptions, 58, 69, 85-89, 101-130  
Public contracts, 334-336  
Public Resolution No. 44, 216-217, 467  
Railway Labor Act of 1926, the, 15, 17, 28, 50-51, 58, 113, 185-186, 198  
Railroad Administration, the, 14  
Ramspeck Amendment, the, 180-183  
Rathbun v. U. S., 56  
Reconstruction Finance Corporation, 332-333  
Refusal to Bargain, 79-82, 134  
Regional attorney, the, 372  
Regional director, the, 370-371  
Reilly, G. D., 339  
Reinstatement, 83, 90-94, 114-118, 323-328  
Representation petition, 298-301  
Representation cases filed, 399-401  
Representatives for bargaining, 133-140  
Republic Steel Case, the, 90-94  
Republic Steel Corp. Case (procedural), the, 279-280  
Review Section, the, 283-296, 310, 359-362  
Richberg, Donald, 26, 28, 33, 45, 55  
Rochester Telephone Case, the, 219  
Roosevelt, President, 30-35, 37-38, 39, 44, 54-55  
Rules of evidence, 264-269, 285-286  
Run-off election, the, 144-155, 206, 217-218, 220-221, 469  
Santa Cruz Case, the, 90  
Saposs, David, 349-350, 355  
Schechter Poultry Corp. et al v. U. S., 54, 56  
Section 7 (a) of N.I.R.A., 23-28, 58, 466  
Securities and Exchange Commission, 84, 226-227  
Settlement, 229, 233-234, 317-331, 405-411, 467-469, 478-481  
Sherman Act, the, 4  
Shipbuilding Labor Adjustment Board, 10  
Shop Committee plan, the, 10  
Smith & Wesson Co. Case, the, 9  
Smith Committee, the, 114, 350-353, 387, 415-420  
Smith, Congressman Howard, 415-420  
Smith, Donald W., 171, 187-189, 192, 194, 199, 339  
Smith, Edwin, 147-148, 153-154, 171, 187, 189-192, 196, 199-200, 339-340  
Stipulations, 313-314, 318-321, 399-400  
State labor relations laws, 457-465  
Strike-breakers, 73  
Strike statistics, 420-436  
St. Joseph's Stockyard Co. Case, the, 127



- Subpoena power, 262-264  
 "Sword of Damocles," 235
- T. & N. O. Case, the, 26  
 Texas & New Orleans R. Co. v.  
 Brotherhood of Railway Clerks, 16,  
 50
- Tovrea Packing Co. Case, the, 93
- Trade agreements, 438-440
- Trial examiner, the, 254-262, 284, 293-  
 296, 307-309, 316, 362-368
- Union attitudes, 440-445
- Union membership, 436-438
- Unit determination, 161-165
- United States Commission on Industrial  
 Relations, the, 5, 6, 113
- United States Railroad Labor Board,  
 the, 15
- U. S. Bureau of Labor, 4
- U. S. Maritime Commission, 84
- Utah Labor Relations Law, 458
- Violence, 72
- Virginia Railway Co. v. System Federation No. 40, 141
- "Voluntarism," 205-208
- Voting eligibility, 139, 160
- Wagner, Senator, 25-26, 30, 36, 51, 52,  
 55, 57, 74, 102, 121, 179, 354-355
- Wagner Labor Disputes Bill, 36-39,  
 466-467
- Walsh-Healey Act, the, 334-335
- Walter-Logan Bill, the, 419-420
- War Labor Board, the, 7-11, 113
- Washington, Virginian & Maryland  
 Coach Co. v. N.L.R.B., 265
- Waterman Steamship Corp. Case, the,  
 265-266
- Waumbec Mills Case, the, 115-117
- Weirton Steel Co., the, 31, 34, 44, 108-  
 111
- Western Union Telegraph Co. Case,  
 the, 9
- Westinghouse Co. Case, the, 129
- Wisconsin Labor Relations Act, the,  
 457-459
- Withdrawals, 315-316, 405-411
- "Yellow Dog" contracts, 12, 17, 21, 24

